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IN THE

Supreme Court of the United States

October Term, 1969.

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No. **1105**

ABC AIR FREIGHT COMPANY, INC.; ADD AIRFREIGHT CORPORATION; AIRBORNE FREIGHT CORPORATION; AIR-LAND FREIGHT CONSOLIDATORS, INC.; AIR-SEA FORWARDERS, INC.; AIRWAYS AIRFREIGHT; BARNETT AIR CARGO, INC.; PETER A. BERNACKI, INC.; HENSEL, BRUCKMANN & LORBACHER, INC.; INTERNATIONAL CUSTOMS SERVICE, INC.; H. G. OLLENDORFF, INC.; PANALPINA AIRFREIGHT, INC.; WTC AIR FREIGHT, and AIR FREIGHT FORWARDERS ASSOCIATION,

Petitioners,

against

CIVIL AERONAUTICS BOARD

and

CF AIR FREIGHT, INC.; CONSOLIDATED FREIGHTWAYS, INC.; P.I.E. AIR FREIGHT FORWARDING, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; NAVAJO FREIGHT LINES, INC.; YELLOW FREIGHT SYSTEM, INC.; GLOBAL AIR CARGO, LTD.; GATEWAY TRANSPORTATION CO., INC., and GATEWAY AVIATION, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 24, 1969.

OPINIONS BELOW

The opinion of the Court below of which review is sought appears in the Appendix hereto (A. 1).[1] It is not yet reported. The earlier opinions delivered by the Court and respondent Civil Aeronautics Board (Board) are as follows: Opinion and Order on Remand of the Board dated April 21, 1969, not yet officially reported, but unofficially reported as C.A.B. Order 69-4-100, Docket 16857 (A. 15) and "Proposed" Regulations PSDR-22 and EDR-159, Docket 20926 (A. 68); Opinion of the Court of Appeals dated March 13, 1968, reported at 391 F.2d 295 (A. 91),[2] and Opinion and Order of the Board dated September 22, 1967, not yet officially reported, but unofficially reported as C.A.B. Order E-25725 Docket 16857 (A. 117).

JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals for the Second Circuit on October 24, 1969. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court's decision allowing the Board to authorize long-haul motor carriers as air freight

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[1] Citations to the Appendix are prefixed "A." throughout this document.

[2] Citations to the Court's first Opinion are to the official Report. For additional reference, the page numbers of the official Report have been indicated in the copy of the Opinion reproduced in the Appendix hereto.

forwarders violated Congressional policy as evidenced in the Federal Aviation Act of 1958 and elsewhere.

2. Whether the Court below deprived petitioners of their rights to judicial review of the Board's Order and Regulations, contrary to 49 U.S.C. §1486.

3. Whether the Court's decision violated the Administrative Procedure Act, 5 U.S.C. §557(c), by allowing the Board to substitute a so-called "experiment" for the findings, conclusions and reasons required by the Act, or otherwise.

APPLICABLE STATUTES AND REGULATIONS

Federal Aviation Act of 1958.

§101(3), 72 Stat. 737, as amended, 49 U.S.C. §1301(3) (1964) (A. 202).[3]

§102, 72 Stat. 740, 49 U.S.C. §1302 (1964) (A. 202).

§408(a)(5), 83 Stat. 103 (1969), Pub. L. No. 91-62, §2 (Aug. 20, 1969), amending 49 U.S.C. §1378(a)(5) (1964) (A. 203).

§408(b), 72 Stat. 767, as amended, 49 U.S.C. §1378(b) (1964) (A. 204).

§1006(a), 72 Stat. 795, 49 U.S.C. §1486(a) (1964) (A. 205).

Economic Regulations of the Civil Aeronautics Board.

§296.43, 14 C.F.R. §296.43 (1969) (A. 206).

§296.86, 34 Fed. Reg. 19342 (1969) (originally promulgated with the Order here under review on April 21, 1969) (A. 207).

§297.34, 14 C.F.R. §297.34, (1969) (A. 208).

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[3] Because of their length the applicable statutes and regulations are set forth in the Appendix.

§297.66, 34 Fed. Reg. 19343 (1969) (originally promulgated with the Order here under review on April 21, 1969) (A. 210).

Administrative Procedure Act.

§2(e), 80 Stat. 388 (1966), 5 U.S.C. §558(c) (Supp. IV, 1969) (A. 211).

§8(b), 80 Stat. 387 (1966), 5 U.S.C. §557(c) (Supp. IV, 1969) (A. 212).

STATEMENT OF THE CASE

This proceeding was instituted by the Board on January 12, 1966 as a "comprehensive" investigation "to fully explore the possible consequences of allowing motor carriers, such as applicants, to be air freight forwarders * * *" (J.A. 11).[4] The Examiner in his initial decision confirmed the broad nature of the investigation when he stated that, while the immediate issue was whether the [then] four applicants should be authorized, the "fundamental" question was whether "long-haul motor carriers of general commodities should be allowed to act as air freight forwarders" (J.A. 748).

Prior to the decision in this case and throughout the more than twenty year history of the air freight forwarding industry, the Board had allowed no long-haul motor

[4] The record herein includes the printed appendices in both No. 31,795 and 33,623 in the Court of Appeals, the former being the assigned docket number prior to remand. The printed Appendix in No. 31,795 was designated "Joint Appendix" and is prefixed "J.A." herein, while that in No. 33,623 was designated "Appendix" and is prefixed "App." The record also includes a Joint Appendix in No. 31,795 that was not printed but instead consists of photo copies of the original record. Since those pages bear only the original record numbers, that part of the record is prefixed "J.A.(R.)."

carrier to become an air freight forwarder.[5] The Board had acted pursuant to a rigid, exclusionary policy, under which air transportation, including *air freight forwarding*, was to be "free of control by surface carriers." *Railway Express, Air Freight Forwarder Application*, 27 C.A.B. 500, 502 (1958). This policy was not a mere creature of the Board but, instead, was described as a "fundamental concept" which "*Section 408 reflects*" and which is "*in accord with congressional intent.*" (*Ibid.*) (emphasis added)

The justification for the Congressional policy is nowhere better illustrated than in this case. The air freight forwarders and long-haul motor carriers are substantial competitors. Many shipments handled by the forwarders move also in motor carriage and vice versa. (While air rates are concededly higher on the average, air offers a distinct advantage in terms of speed.) Competition between the two modes is increasing, as motor carrier costs rise in relation to the costs of providing air freight service, and as the rate differential between the two modes narrows.[6] In fact, with the railroads

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[5] The Board's only citation to a case where a long-haul motor carrier was allegedly awarded authority was to United Parcel Managers Co., Order E-7324, April 22, 1953 (A. 122). However, the Court below properly dismissed that case as having been accorded no significant precedential value, since that carrier's authority by and large was and is restricted to parcels of 50 pounds or less (391 F.2d at 301, n. 7). Hence, *the Board, until now, has never awarded air freight forwarder authority to a long-haul motor carrier with unrestricted general commodity authority* or even intimated that it would do so.

[6] The Board found that as a result air competition will capture more and more surface freight (A. 25-26).

now virtually out of the passenger business, and with the air freight forwarders becoming the major carriers of air freight (see p. 10, *infra*), there is now no greater area of regulated air-surface competition than that which exists between the air freight forwarders and the long-haul motor carriers.

Notwithstanding this intensification of competition between the air freight forwarders and the long-haul motor carriers, the Board decided to admit the nation's *largest* long-haul motor carriers into air freight forwarding (Order E-25725, A. 117). The Court, however, on review, vacated the awards and remanded the case to the Board, concluding that the Board's findings in support of entry of long-haul truckers as a class were wanting in the careful investigation, substantial evidence, and rational explication required by law, particularly in view of the fact that the Board's proposed action (1) was "fraught with danger" insofar as impact on the existing industry was concerned (391 F.2d at 307), (2) constituted a total reversal of policy from that previously adhered to over the course of many years (*id.*, at 301), and (3) was opposed to a "general policy Congress has long decreed" (*id.*, at 307).

On remand, the Board, after receiving briefs and hearing oral argument, but without further hearing and, indeed, without reopening the record, reached basically the same result as the first time (Order 69-4-100, A. 15). At the same time, the Board *rejected* the Court's conclusion that it must follow Congressional policy as found by the Court (A. 18). Perhaps for that reason, the major differences in the Board's second opinion were more of form than of substance, that is, the long-haul motor carrier applicants other than those parties to the proceeding were now to be screened through "proposed" regulations which were issued simultaneously with the decision (A. 68). The criteria for admission were to be

identical, however, to the criteria employed in the case of the first three (A. 44). The Board nevertheless stated that hereafter the policy was to be one of "monitored" entry under the regulations (A. 18).

Vice Chairman Murphy, who dissented from the original decision, again dissented on the grounds, *inter alia*, that the Board's Order was non-responsive to the Court's mandate (A. 49).

The Court of Appeals in its second Opinion affirmed the Board's Order on Remand (A. 1).[7] It admitted, however, that the Board had failed to consider the applicable Congressional policy (A. 10) and also acknowledged that the Board had failed to deal with other directives of the Court upon Remand (A. 6). The Court significantly made *no* determination whether the Board had complied with Section 8(b) of the Administrative Procedure Act. (Compare 391 F.2d at 298 and 307). Finally, the Court abandoned its earlier requirement that the Board articulate its rules in terms of the impact of the probable entrants on the existing independent air freight forwarding industry (*id.*, at 298 and 300), the Court holding instead that the "proposed" rules, through which other applicants were to be screened under the monitored "experiment," did not yet affect petitioners and, therefore, were not subject to review (A. 12). As will be evidenced hereafter, the Court's decision is highly prejudicial to petitioners and not in accord with law.

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[7] Jurisdiction in the Court of Appeals was based on Section 1006(a) of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. §1486(a) (1964).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The Decision Below Sanctioned An Important And Basic Change In The National Transportation System.

Air freight forwarding is a dynamic and rapidly growing segment of the nation's transportation system. Air transportation generally is the growth leader among transportation modes, and within air transportation, air freight is growing faster than passenger traffic.[8] And, as will be demonstrated below, the air freight business of the forwarders is growing more rapidly than that of the direct air carriers.

The air forwarder is a common carrier. As such, he assumes total responsibility for his customers' shipments from origin to destination. Since air freight forwarders do not operate aircraft, his services necessarily consist of promoting, selling, routing and handling air freight, document preparation, and movement of air freight on the ground at origin and destination, as well as at interline points. The forwarder's customer normally is not aware of the identity of the underlying direct air carrier utilized for his shipment. The forwarder often acts as a transportation advisor, thereby preventing the shipper from making costly distribution errors. (See generally J.A. 729-30; 391 F.2d at 304.)

The dramatic growth in the volume of revenues (but not earnings) in the *air* freight forwarding industry is attributable in large part to the nature of the air freight market and the functions the forwarder performs. Air

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[8] A. 50; 1968 C.A.B. Ann. Rep. 139.

freight traffic is theoretically capable of moving from the door of the consignor to the door of the consignee at nearly the speed of sound. In fact, however, the door-to-door time is considerably slower. The reason is that the traffic consists of relatively small shipments (as opposed to bulk shipments), and each shipment must be handled, moved on the ground, documented and consolidated for line-haul movement. The dramatically increased efficiencies in the line-haul movement of air freight brought about by new and better aircraft has required the industry to keep pace on the ground in order that the inherent advantages of air transportation not be lost. As the figures indicate, the forwarders, whose expertise lies in these areas of increasing need, have risen to the occasion and have met these needs with marked success.[9]

The forwarder receives compensation for his services, in part, from being able to consolidate smaller shipments into larger ones, which then move at the lower volume unit rates of the direct air carriers, the rate structures of the latter reflecting reduced unit costs for large shipments (J.A. 730).

In 1965, the year of record in this proceeding, the air freight forwarding industry generated commercial revenues of $164 million, or 37% of total air freight services sold to the public, against 63% for the direct air carriers.[10] In 1968, the volume of forwarding

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[9] In contrast, the *surface* forwarder operates in a more limited segment of the total market and has fewer opportunities. *Air Freight Forwarder Case,* 9 C.A.B. 473, 517-18 (1948).

[10] These figures are taken from the following reports required to be filed with the Board, of which official notice may be taken under Rule 24(m) of the Board's Rules of Practice: Forms 244

(cont'd)

revenues had risen to $298 million – nearly double 1965 – and its share of the total market climbed to 42% compared with 58% for the direct carriers. Commercial air freight revenues for the industry in 1968 totalled more than $700 million. It is thus apparent that what is involved in this decision today is close to a billion-dollar industry, in which the independent air freight forwarders are substantial contributors and imminently may well be the major contributors.

On the basis of the foregoing figures, and given the rate of technological growth in air transportation throughout the years, it has frequently been predicted that in the not too distant future, freight revenues will exceed passenger revenues in air transportation. *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624, 637 (D. C. Cir.), *cert. denied*, 385 U.S. 843 (1966) (dissenting Opinion of Judge Burger). Compare 1968 C.A.B. Ann. Rep. 139.

As noted earlier, the Board's Order affirmed by the Court would, for the first time, allow the nation's largest motor carriers as a class to become air freight forwarders. The invasion would be large scale. Already, a total of sixteen such carriers have been admitted or have filed applications and are waiting in the wings to enter (A. 44). More will surely follow if for no other than competitive reasons (391 F.2d at 300). Under the announced standards most if not all future

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(Footnote 10 continued)

(filed by air freight forwarders); Handbook of Airline Statistics, Part II, Table 83 (1967 ed.) (summarizing the direct air carrier data). The reported figures of the direct air carriers have been adjusted to eliminate revenues not received from the shipping public, *i.e.*, forwarder payments.

applicants will be admitted, since there will be no basis for distinguishing the latter from those already admitted.

As a result of the Court's decision, the shipping public stands to lose the *substantial* benefits of long-haul motor carrier/air freight forwarder competition, which Congress has taken such pains to preserve (see Point II, *infra*). The choice of mode for the shipper's goods – which any carrier operating competing modes could strongly influence through its sales efforts, service and position as transportation advisor – will be made in this instance on the basis of carrier profitability. And because of the substantial fixed investment of the truckers in their motor carrier operations in comparison to air,[11] the major incentives of these applicants will be to promote surface transport at the expense of air, in direct violation of Section 102 of the Act. *Application of ABCO Moving & Storage Corp. et al.*, Order E-16474, March 3, 1961, C.A.B. Docket No. 12193, p. 4 (mimeo.); *Air Freight Forwarder Case*, 9 C.A.B. 473, 510 (1948); *Latin American Air Service*, 6 C.A.B. 857, 903-04 (1946).

In addition, the entry of the motor carriers can be expected to adversely affect the "highly vulnerable" existing air freight forwarders. Ninety percent of the forwarders collectively suffered a loss of $1.1 million in 1965 (391 F.2d at 299). Such entry under the circumstances would thus be in derogation of the Court's finding that "the continued health of the independent forwarders is of utmost importance not only

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[11] In 1965, the applicants' collective investment in long-haul motor vehicles alone approximated $157 million dollars, before considering any other fixed investments incidental to applicants' long-haul motor carrier business (J.A.(R.) 1892, 2524, 3076 and 3086). Against that massive figure applicants propose to invest only a total of $1 million in air freight forwarding facilities (J.A. (R.) 1904, 2596-2600 and 3046).

to themselves but to the future of air freight" (*id.*, at 300).[12] Of course, competition would be further eliminated to the the extent present independent forwarders are driven from the industry.

These undesirable competitive effects are being sanctioned apparently in the name of intermodal coordination (see the discussion of the Examiner at A. 162 which was adopted by the Board at A. 18). While that concept is presently much in vogue, Congress has yet to legislate in the area.[13]

In short, what is involved in this case is a basic change in the national transportation system which will adversely affect competition by eliminating the Congressional policy against entry of surface carriers into air transportation in an area where it is most effective. While such change might properly be the subject of legislative concern, it is beyond the power of the Board to enact under existing statutes.

[12] On remand, but without reopening the record, the Board simply abandoned its earlier finding that entry of the motor carriers would hasten the demise of a number of air freight forwarders (A. 39 and 121). It also ignored *for the purpose of determining competitive impact*, the substantial *total* financial resources of the applicants, denying that such resources would give applicants a substantial competitive advantage over petitioners (A. 38-39). But as the Board noted elsewhere, such *total* resources would be available to the applicants (A. 27), and the seriousness of the threat to the forwarders is indicated by the fact that the operating revenues of just the three applicants *already admitted exceed* those of the *entire* air freight forwarding industry (J.A.(R.) 2892).

[13] Point II, *infra*. The Act creating the Department of Transportation left the various economic regulatory functions of the independent administrative agencies intact and did not change any substantive economic regulatory law in the transportation field. Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C. §1651, *et seq.* (Supp. IV, 1969).

II. The Court Below Interpreted The Federal Aviation Act In A Manner Contrary To Congressional Intent And Long-Standing Administrative Construction.

This case involves the power of the Board under the Act to reverse a long-established course of action (391 F.2d at 301 and 302) in a direction not only fraught with danger but also clearly in opposition to Congressional intent (*id.*, at 307).

The Board has generally licensed air freight forwarders under the broad public interest standards contained in Sections 101(3) and 102 of the Federal Aviation Act of 1958, respectively 49 U.S.C. §§1301(3) and 1302 (1964), and Regulations issued pursuant thereto, §§296.43 and 297.34 of the Board's Economic Regulations. In addition to those standards, Section 408(a)(5) of the Act, 49 U.S.C. §1378(a)(5) (1964), as recently amended by Pub. L. No. 91-62, §2 (Aug. 20, 1969) in respects not here material, proscribes the acquisition of air freight forwarders by other common carriers, unless the Board finds under Section 408(b), 49 U.S.C. §1378(b) (1964), that such transactions are in the public interest and do not tend to restrain trade or create a monopoly.

Beyond those very broad standards, however, the statutes contain some very pointed language which relates to the matter at hand. Subsection (b) of Section 408 of the Act further provides that, while the Board, under certain circumstances, may approve acquisitions of control by common carriers of air carriers:

> " * * * if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of Section 5(8) of the Interstate Commerce

> Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition."

The long-haul motor carriers clearly fall within the purview of the above-quoted statute, which has been held to constitute virtually an absolute bar to the entry of any surface common carrier into air transportation as a direct air carrier. *American President Lines, et al., Petition*, 7 C.A.B. 799 (1947). But because of the reference to the use of "aircraft to public advantage in [applicant's] operation" in the second proviso of Section 408(b), and the fact that air freight forwarders are expressly prohibited by *Board* Regulations (14 C.F.R. §§296.1(a)(1) and 297.1(a)) from operating aircraft directly, the Board has uniformly held the second proviso to be non-applicable *literally* to an acquisition of an air freight forwarder.[14]

However, *notwithstanding that holding*, the Board for over twenty years at the same time applied a *rigid policy of exclusion* against surface carrier invasion of *air freight forwarding*. Thus, in the *Railway Express Case, supra*, p. 5,

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[14] *American Airlines, Inc. v. C.A.B.*, 178 F.2d 903, 909-10 (7th Cir. 1949). It should be noted, however, that the Board's decision in this matter was not unanimous, member Jones in a dissenting opinion having concluded otherwise (9 C.A.B. 524).

which involved the application of a railroad-controlled company for air freight forwarding authority, the Board concluded:

> "Section 408 reflects the established general policy that our air transportation system shall be free of control by surface carriers. This fundamental concept cannot be ignored. * * * Rigid limitation of other forms of transportation in the Nation's air transportation system is in accord with congressional intent and is necessary for a soundly developed system." (27 C.A.B. at 502.)

See also the Board's Opinion in the *Air Freight Forwarder Case, supra,* 9 C.A.B. at 502.

Judge Friendly confirmed the existence of this statutory policy behind the second proviso of Section 408(b) prohibiting entry by surface carriers into air freight forwarding in his first opinion, setting forth at length the various manifestations of the policy, and noting that it was not wholly agency determined, but, instead, was a "radiation" from Congress.[15] While recognizing expressly that the second proviso of Section 408(b) did not *literally* apply to the acquisition of indirect air carriers, he concluded that the Board nevertheless:

> "is necessarily obliged to consider the policies behind the proviso in regulating entry into *forwarding*." (391 F.2d at 302) (emphasis added.)

In response to this clear mandate of the Court, the Board, incredibly, stated on remand:

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[15] 391 F.2d at 302-03.

> "At the outset, the Board rejects the contention that the second proviso of Section 408(b) reflects a Congressional policy against surface carrier participation in the air forwarding business." (A. 18.)

It was beyond the power of the Board thus to reject and to refuse to consider the applicable Congressional policy.[16] The Board is required to formulate policy within the four corners of the statute. As the Board itself recognizes:

> "It is not the function of an administrative body to create basic policy but to administer that which Congress has prescribed." (*American President Lines, supra*, 7 C.A.B. at 800)

And as one noted commentator has stated:

> "On ordinary problems of interpreting statutes, except when the subject matter is technical and nonlegal, the courts are the specialists, whether analysis of legislative history is called for, or whether the main process is one of finding the meaning of the words." (4 Davis, *Administrative Law Treatise* 242 (1958.)

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[16] Judge Friendly, in two classic understatements, noted that the Board had "attempted" to deal with the Court's objections as stated in its first Opinion (A. 6), and characterized the Board's confrontation with the Court on the issue of the policy behind Section 408(b) as involving but a

> "nuance of difference between the Board's views and those intimated in our previous opinion" (A. 10).

The record, however, speaks for itself.

The Court's action allowing the Board to reject Congressional policy was thus clearly error. It was also highly prejudicial to petitioners.

First, the Board's erroneous view of what the Congressional policy is, undoubtedly colored its findings and helped to render them deficient. See Point IV, *infra*.

Second, we do not believe the Board could have reached the result that it did if it had applied the appropriate standards. The Board had before it the largest carriers (p. 12, n. 12, *supra*) from by far the most competitive mode of transportation for air freight (p. 6, *supra*). Under the circumstances, *if there was any policy against surface entry at all, the Court could not very well have allowed the Board to admit these particular applicants,* much less have provided for the entry of a substantial number of other long-haul motor carriers, as it did. Indeed, considering the nature of the competition between the applicants and petitioners, to have done so would have been consistent only with the Board's statement that absolutely no such Congressional policy against surface carrier participation existed.

It is not at all surprising, therefore, that the Board apparently felt constrained to confront the Court on this issue. But for the reasons shown above, it was and is beyond the power of the Board to alter Congressional policy in this important area of commerce. What is surprising, and gross prejudicial error, is for the Court in its second Opinion to ignore its interpretation of the statute given to the Board in the Court's first Opinion, and to permit the Board to reject the Court's own correct interpretation of the statute.

III. The Decision Below Would Foster A Means Of Circumventing The Review Provisions Of The Administrative Procedure Act And Review Statutes.

The Board has formulated a procedure designed effectively to prevent review by the Courts of the impact of its actual decision in this case, and the Court of Appeals has given its blessing. The procedure, while ingenious, results in a denial of petitioners' rights under the applicable review statutes.

The Court of Appeals was greatly troubled when it first reviewed this case over the probable impact of the Board's unlimited entry policy on the existing independent air freight forwarders (391 F.2d at 298). Recognizing that the independent forwarders *must* be preserved as a viable competitive force (*id.*, at 300), the Court expressly required the Board to articulate its entry policy and assess its impact in terms of numbers of probable entrants (*id.*, at 300) and resultant competitive impact (*id.*, at 298).

On remand, the Board, as noted previously, reached the same conclusion with respect to the same applicants before it, but this time, as to all future applicants, professed to withhold judgment and to adopt a policy of "monitored" entry (A. 18). It gave form to its latter pronouncement by promulgating "proposed" regulations governing future entry (A. 68). The criteria for admission were to be *exactly the same*, however, as those applied to the members of the class already admitted. Indeed, the Board expressly stated that it would apply the "*same criteria*" to future entrants as were applied to the applicants before it (A. 44), and further noted its rules were being "*codified*" in the "proposed regulations" (A. 18). It is noteworthy that the "proposed" regulations have now been made final. As

promised by the Board, there was *no* change whatsoever in the criteria for future admission. *Compare* "proposed" Sections 296.86 and 297.66 at A. 79 and 84 *with* their "final" counterparts at 34 Fed. Reg. 19342 and 19343.

The Court of Appeals nevertheless *this time* affirmed the Board. In so doing, it avoided the impact issue, its justification being that the Board had only issued proposed regulations, review of which would be "premature" (A. 12). The Court said that petitioners were required to "await further grants pursuant to the regulations by which petitioners might be aggrieved" (*ibid.*).

The Court's rationale for avoiding the impact issue will not stand scrutiny. Prematurity, or conversely reviewability, is a function of the practical effect of the decision below, not of form. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416-17 (1941).

It is clear that the Board both in its original Order and in Order 69-4-100 did, in fact, formulate *final* rules for entry of long-haul motor carriers as a class into air freight forwarding. Merely labeling its rules as "proposed" does not make them any less reviewable, particularly in view of the Board's stated intention to apply already formulated criteria to future applicants (A. 44). Nor were the rules any less effective because made on an evidentiary record in an adjudicatory proceeding. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203, *reh. denied*, 332 U.S. 783 (1947).[17] Opinions accompanying adjudicatory proceedings "may have essentially the same effect as rules." 1 Davis, *Administrative Law Treatise* 297 (1958).

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[17] Indeed, the Board's manner of proceeding was eminently sound, since the rules announced in this case bear upon economic enterprise and touch upon the financial aspects of great numbers of businesses affected (see Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc.

(cont'd)

It is also clear that the practical effect of the Board's rules thus formulated is prejudicial to petitioners' rights.

First, as matters now stand, petitioners will be required to review the orders of the Board admitting applicants under its regulations *seriatim*. This obviously places an impossible burden on petitioners, as well as the Courts, in that it will either require petitioners to prosecute multiple appeals as a means of anticipating the precise moment the Board's entry policy becomes illegal due to its cumulative impact or, if petitioners are to attempt to estimate the single precise moment when the invasion becomes unbearable (assuming it has not already been reached), it will place an undue risk of irreparable injury on petitioners which could arise from having waited a moment too long.

Second, the matter is clearly ripe for review because petitioners will be irreparably harmed by a large scale invasion of motor carriers into their midst if review is not obtained (see p. 12, n. 12, *supra*). As will be demonstrated in Part IV, *infra*, while the agency has purported to substitute experimentation for the findings required under Section 8(b) of the Administrative Procedure Act, this so-called experiment is in reality uncontrolled, since its impact will be ascertainable only on an after-the-fact basis by reason of data *to be* reported by an *unspecified* number of successful applicants. It is uncontrollable for the further reason that the legal means to terminate or reduce the experiment are lacking (p. 23, *infra*).

In short, petitioners are exposed to serious risks unless it obtains review now. Petitioners are not faced with a mere modification of rights under their present

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(Footnote 17 continued)

No. 8, 77th Cong., 1st Sess., 107-08 (1941)), and the proceeding also involves sharply conflicting factual issues (S. Rep. No. 752, 79th Cong., 1st Sess., 18 (1945)). In any event, having made rules in this manner, the Court cannot allow the Board to run away from the record.

licenses. Petitioners, instead, have been plunged into a highly unstable environment featuring a massive invasion of newly-licensed competitors which is already well under way.[18]

Certainly, there is no administrative purpose to be served by waiting. The record, upon which the regulations were promulgated and their impact can be assessed, is the record before us. There has been full opportunity to make necessary findings on the impact issue (indeed, the Court directed the Board to do so (391 F.2d at 300)).

Accordingly, the *Court's* finding that "[p]etitioners will be affected by the regulations only when, as and if the Board grants further authorizations to long-haul truckers under them" (A. 12), and the *Board's* findings, which were limited solely to the impact of the three applicants before it (A. 17), are clearly inadequate. By thus ignoring the real impact of the regulations, the Court has effectively deprived petitioners of their right of review, and has invited other agencies to defeat review in the same manner.

IV. The Decision Below Would Undermine Section 8(b) Of The Administrative Procedure Act By Allowing Agencies To Substitute "Experimentation" For The Requisite Findings Under The Act.

While the Board struggled on remand to patch up its findings in a few of the numerous respects earlier found

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[18] We again call this Court's attention to the Board's stated intention to license future applicants on the same basis as the instant ones (A. 44), a factor clearly to be given great weight in deciding the question of reviewability. *Columbia Broadcasting System v. United States, supra,* 316 U.S. at 422.

deficient, it failed a second time. Indeed, many of the major defects found by the Court the Board ignored the second time around, satisfying itself with lengthening rather than supporting its decision. Perhaps realizing the difficulty in supporting its decision with findings on this record, it resorted to the expedient of justifying all in the name of "experimentation." Such action, if approved, could completely pervert Section 8(b) of the Administrative Procedure Act.

In *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), this Court stated:

> "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limitations on its discretion." (371 U.S. at 167.)

The foregoing statement applies with equal force to experimentation.

We do not believe any experimentation is permissible in this case, in view of the clear Congressional policy against surface carrier entry into air freight forwarding (Section II, *supra*) and the danger which a reversal of such policy entails (391 F.2d at 307). But even if those factors were not present, what was done here is not proper experimentation.

1. Proper experimentation in this case would require an estimate of the number of participants and the impact if the experiment goes wrong (391 F.2d at 300). Here, the Board quite clearly did not make such an estimate and therefore has no idea what the limits of its "experiment" are.

2. The Court has apparently adopted the Board's contention in support of its experiment that control can be maintained by instantly revoking the licenses issued to participants. However, the operating authorization of an air freight forwarder is a license within the meaning of Section 2(e) of the Administrative Procedure Act, 5 U.S.C. §558(c), see *Airfreight Forwarder Investigation*, 21 C.A.B. 536, 609 (1955), notwithstanding the fact that such license may be obtained initially without hearing. It is also clear that the Board could not simply cancel the authorizations here at issue without a lengthy and protracted hearing measured in years. In *Re Carter*, 177 F.2d 75 (D. C. Cir.), *cert. denied, sub nom., Laws v. Carter*, 338 U.S. 900 (1949); *Air Freight Forwarder Investigation, supra*. In the meantime, given the precarious posture of the existing independent air freight forwarding industry (391 F.2d at 299), irreparable injury would have been done.

What forced the Board into this posture of experimentation is clear. It could not reach the decision it apparently wanted to reach on the basis of policy on the record before it. Following are a selected sample of key findings which illustrate the strain that the Board must have been under. We do not ask the Court to determine the substantiality of the evidence on all substantive issues in this case at this juncture. Instead, we present these examples merely to shed light on the Board's action, which the Court sanctioned, whereby it (1) refused to apply the applicable Congressional policy to this case (Point II, *supra*), (2) resorted to artful devices to avoid judicial review of the issue of competitive impact

(Point III, *supra*), and (3) substituted "experimentation" for findings, reasons and evidence required by Section 8(b) of the Administrative Procedure Act.

1. The Court affirmed an ultimate finding that applicant's services are needed because the air freight industry is plagued by an overabundance of unused capacity. The specific finding was that less than 25% of the available capacity for freight was being utilized (A. 25). The 25% figure is either absurd or, if it is accurate, such waste of resources does not speak well of both the regulators and the regulated.

Fortunately, it is the former which is true. The evidence relied on appears at J.A.(R.) 2204-05.

The Board's load factor finding is patently absurd because the 25% figure is a *weight* load factor. However, the capacity of freight services, particularly that available on passenger aircraft, is limited by *volume*. No meaningful estimate of unused capacity can be made, therefore, without determining what portion of available *space* goes out empty.[19] This the Board did not do. It should also be noted that the practical capacity

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[19] The space problem is particularly acute for freight carried in the odd shaped belly compartments of passenger aircraft. In passenger services, there is very little space left after allowing for the space needed for passengers above deck, the space needed for passenger baggage and mail below deck and the plumbing and other fixtures which intrude into the belly compartment of an airplane, none of which factors the Board took into consideration. Were it not for the Board's expertise, this might appear to be a classic case where one look at the average loaded passenger aircraft and the available freight, which weighs at most 10 pounds per cubic foot on the average, is worth thousands of pages or record, and where, in view of the Board's finding, the regulators might well be accused of regulating from an ivory tower.

of any given airline operation – whether passenger or freight, or whether based on weight or space – is considerably less than 100%. Because of the uneven flows of traffic and the volume limitations on capacity, any carrier that consistently runs without substantial amounts of so-called "unused" capacity measured by weight is not providing enough capacity. There thus has been not only no colorable attempt to make a finding as to the amount of unused capacity in the industry, but the circumstances are such, given the Board's expertise, as to call into question the *objectivity* of the Board *in this entire case.*

2. The Court affirmed the Board's finding that the long-haul motor carriers will promote traffic in the outlying, secondary air freight markets. The evidence relied on, however, was simply data showing that most existing air freight forwarder traffic is generated in a relatively small number of top markets (A. 28), and that air freight forwarding "may not be directly profitable" at the outlying points (*ibid.*). There is absolutely no indication that operations *at such points* would be any more profitable and, hence, any more productive of traffic for the motor carrier forwarders (*ibid.*). What is indicated is that the truckers would do everything possible to protect their substantial investments by using their trucking facilities there and elsewhere (see p. 11, *supra*). Moreover, the Board has found in other cases before it that there is in fact no undeveloped air freight potential at the outlying markets. See *Domestic Coterminal Points-Europe All-Cargo Service Investigation,* Order E-25513, August 9, 1967, C.A.B. Docket No. 18531, pp. 2-3 (mimeo.).

3. The Court after remand did not require a finding as to whether long-haul motor carriers would suffer disabling conflicts of interest as between their air and surface operations (the Board merely concluded, after

believing for twenty years to the contrary, that any suggestion of conflicts was nothing more than "hypothesis") (A. 35). Based on a review of the record, Judge Friendly had earlier found the Board's original findings of no conflicts to be "at war with common sense" and to suffer from a "certain unreality" and "serious confusion of thought" (391 F.2d at 304) and, indeed, he further found that it would be a "formidable" task to find no conflicts on remand on this record (*id.*, at 303). *Thus*, it is explained why there is now *no* finding on this very crucial issue.

4. The Court affirmed an Order and Opinion in which the major findings are in conflict. On the one hand, the Board found that the long-haul motor carriers would have no conflicts of interest because they would gladly divert shipments of up to 200 pounds from their surface operations to a more profitable air freight forwarder operation (A. 34). On the other hand, the dominant public interest justification for the decision below was that applicants' services were needed at the *outlying secondary points*, where traffic is allegedly not being promoted (A. 28). The evidence relied on undisputedly indicates, however, that air freight forwarding is more profitable than long-haul motor carriage only in the case of a relatively few forwarders (J.A.(R.) 4466), who admittedly concentrate most of their services at the *major points* (A. 28) where profitable consolidations can be effected (*ibid.*). It is undisputed that the *long-haul* truckers provide *no short-haul* service today. *Missing* is *any* finding that would reconcile these contradictory findings by showing how the applicants would get their small shipments from the secondary points to the major points where the profits are but where there is already a plethora of service and, hence, *no* justification for their operations.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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January 22, 1970

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IN THE

Supreme Court of the United States

October Term, 1969

Office-Supreme Court, U.S.
FILED
JAN 22 1970
JOHN F. DAVIS, CLERK

No. 1105

ABC AIR FREIGHT COMPANY, INC.; ADD AIRFREIGHT CORPORATION; AIRBORNE FREIGHT CORPORATION; AIR-LAND FREIGHT CONSOLIDATORS, INC.; AIR-SEA FORWARDERS, INC.; AIRWAYS AIRFREIGHT; BARNETT AIR CARGO, INC.; PETER A. BERNACKI, INC.; HENSEL, BRUCKMANN & LORBACHER, INC.; INTERNATIONAL CUSTOMS SERVICE, INC.; H. G. OLLENDORFF, INC.; PANALPINA AIRFREIGHT, INC.; WTC AIR FREIGHT, and AIR FREIGHT FORWARDERS ASSOCIATION,

Petitioners,

against

CIVIL AERONAUTICS BOARD

and

CF AIR FREIGHT, INC.; CONSOLIDATED FREIGHTWAYS, INC.; P.I.E. AIR FREIGHT FORWARDING, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; NAVAJO FREIGHT LINES, INC.; YELLOW FREIGHT SYSTEM, INC.; GLOBAL AIR CARGO, LTD.; GATEWAY TRANSPORTATION CO., INC., and GATEWAY AVIATION, INC.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

No. 254–September Term, 1969.

(Argued September 16, 1969 Decided October 24, 1969.)

Docket No. 33623

ABC AIR FREIGHT COMPANY, INC.; ADD AIRFREIGHT CORPORATION; AIRBORNE FREIGHT CORPORATION; AIR-LAND FREIGHT CONSOLIDATORS, INC.; AIR-SEA FORWARDERS, INC.; AIRWAYS AIRFREIGHT; AMERICAN EXPRESS COMPANY; BARNETT AIR CARGO, INC.; PETER A. BERNACKI, INC.; EMERY AIR FREIGHT CORPORATION; HENSEL, BRUCKMANN & LORBACHER, INC.; INTERNATIONAL CUSTOMS SERVICE, INC.; H. G. OLLENDORFF, INC.; PANALPINA AIRFREIGHT, INC.; PENSON FORWARDING CORPORATION; WTC AIR FREIGHT; and AIR FREIGHT FORWARDING ASSOCIATION,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

and

CF AIR FREIGHT, INC.; CONSOLIDATED FREIGHTWAYS, INC.; P.I.E. AIR FREIGHT FORWARDING, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; and NAVAJO FREIGHT LINES, INC.; YELLOW FREIGHT SYSTEM, INC.; GLOBAL AIR CARGO, LTD.; GATEWAY TRANSPORTATION CO., INC. and GATEWAY AVIATION, INC.,

Intervening Respondents.

LUMBARD, *Chief Judge*,
FRIENDLY and KAUFMAN, *Circuit Judges*

Petition to review an order, 69-4-100, issued by the Civil Aeronautics Board after a remand from this court, 391 F.2d 295, which granted the applications of three long-distance truckers or their subsidiaries to act as air freight forwarders and related applications for acquisitions of control, and to terminate a rule-making proceeding with respect to the future authorizations of other long-distance truckers or their affiliates. Petition denied insofar as it relates to the order and dismissed insofar as it relates to the rule-making proceeding.

LOUIS P. HAFFER and ROBERT N. MEISER (Andrew P. Goldstein, Washington, D. C., and Paul Berger, New York, New York, of Counsel), *for Petitioners.*

O. D. OZMENT, Deputy General Counsel, Washington, D. C. (Warren L. Sharfman, Associate General Counsel, Litigation and Research, J. Michael Roach and James Keough, Attorneys, Civil Aeronautics Board, Richard W. McLaren, Assistant Attorney General, Howard E. Shapiro, Attorney, Dept. of Justice, Joseph B. Goldman, General Counsel, Civil Aeronautics Board, Washington, D. C., of Counsel), *for Respondent.*

JOHN N. WANNER and EUGENE T. LIIPFERT (Verner, Liipfert, Bernhard and McPherson, Washington, D. C., of Counsel), RAYMOND J. RASENBERGER (Zuckert, Scoutt & Rasenberger, Washington, D. C., of Counsel), and ROBERT J. SISK (Hughes, Hubbard, Blair &

Reed, New York, New York, of Counsel), *for Intervening Respondents CF Air Freight, Inc., Consolidated Freightways, Inc., P.I.E. Air Freight Forwarding, Inc., Pacific Intermountain Express Co., and Navajo Freight Lines, Inc.*

HOMER S. CARPENTER, Washington, D. C., *for Intervening Respondents, Yellow Freight System, Inc., Global Air Cargo, Ltd., Gateway Transportation Co., Inc., and Gateway Aviation, Inc.*

Friendly, *Circuit Judge:*

In *A. B. C. Air Freight Company v. C. A. B.*, 391 F.2d 295 (1968), this court vacated an order of the Civil Aeronautics Board dealing with applications of motor carriers to operate as freight forwarders. The Board, with Vice Chairman Murphy dissenting, had granted applications of three long-distance truckers or their subsidiaries to act as air freight forwarders, along with related applications for approval of acquisitions of control, and had indicated an intention similarly to grant a fourth. We remanded the cause for further consistent proceedings. Having invited the parties to file briefs directed to the action it should take and having heard oral argument, the Board, with Vice Chairman Murphy again dissenting, rejected petitioners' contention that it should dismiss the proceeding or hold another evidentiary hearing. On the basis of further findings it granted the applications of CF Air Freight, Inc., and Navajo Freight Lines, Inc., to act as domestic and international air freight forwarders and of P. I. E. Air Freight Forwarding, Inc. to act as a domestic air freight forwarder for a period of five years; the Board also granted related applications with respect to acquisitions of control. The authorizations and approvals were

made subject to numerous conditions which are set out in the margin.[1] The Board denied the motions of seven other motor carriers or their affiliates to intervene and have their applications consolidated. Instead it instituted a rule-making proceeding with respect to the handling of applications from these and other motor carriers and to the making of reports, of which more hereafter. Petitioners ask us to set aside the authorizations and to terminate the rule-making proceeding as contrary to our mandate and otherwise unlawful.

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[1] 7. That the authorizations and approvals granted herein shall be subject to the following conditions:

(a) The Board may revoke an authorization or approval, in whole or in part, if it finds after hearing that (1) the holder is no longer capable of performing the authorized air transportation or of conforming to the Act or the regulations thereunder; (ii) the holder is no longer willing to conscientiously promote air cargo and to benefit air transportation; or (iii) the holder's operations, alone or together with other similar carriers granted air freight forwarding authority, will create a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party thereto, or will otherwise be inconsistent with the public interest.

(b) If proceedings are instituted to revoke an authorization or approval under paragraph 7(a), the Board may suspend or limit such authorization or approval pending the outcome of the proceedings in accordance with the procedures specified by Sections 296.48 and 297.43 of the Board's Economic Regulations.

(c) CF Air Freight, Inc., Navajo Freight Lines, Inc., P.I.E. Air Freight Forwarding, Inc., and National Air Freight Forwarding Corporation shall file, in addition to the financial and satistical reports prescribed by Part 244 of the Board's Economic Regulations, the following schedules in the format attached to this order:

(i) The "Originating Air Station Data" schedule reflecting the source of air freight tonnage enplaned and deplaned at originating air station (exclusive of

The "most serious deficiency" we found in the Board's original order was "the ambiguity whether the Board has

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(Footnote 1 Continued)

reconsolidations) and data on the miles of surface movement of the air freight before and after its air transportation.

(ii) The "Supplemental Operating Statistics" schedule reflecting the number and weight of those air freight shipments handled by both the air freight forwarder and the surface carrier who is its parent or affiliate or who operates as a separate division within the same corporate structure.

(iii) The "Analysis of Traffic by Weight Breaks" schedule reflecting, by specified weight breaks, the number and weight of shipments handled in air freight forwarding operations and the revenues received for the shipments.

(d) The persons named in paragraph 7(c) above shall also file with the Board, within 45 days after the close of each calendar year, a report showing as of December 31 of such year the location of each specialized air freight forwarding station and of each surface transport terminal at which air freight forwarding services are offered. The statement shall indicate, for each station or terminal, the number of drivers, salesmen, and other personnel who are assigned to promote air freight exclusively.

(e) Navajo Freight Lines, Inc., Pacific Intermountain Express Co., and Consolidated Freightways, Inc., shall file with the Board's Bureau of Accounts and Statistics, not later than 45 days after the end of each calendar quarter, the "Analysis of Traffic by Weight Breaks" schedule, in the format attached to this order, reflecting, by specified weight breaks, the number and weight of shipments handled in long-haul motor carrier operations and the revenues received for the shipments.

(f) In addition, the persons named in paragraph 7(e) above shall file the "Analysis of Traffic by Weight Breaks" schedule showing comparable data, to the extent available, for the corresponding quarter of each of the preceding five years.

established a policy of entry for all truckers who want to act as air freight forwarders or has merely granted the four applications that were before it, and the inadequacy of its consideration of effect on the existing forwarders if the former is the right interpretation as we strongly suspect." 391 F.2d at 298. In addition, after citing the Board's previous policy of granting air forwarding authority to surface carriers "only after study of the particularized situation convinced it that the carrier's conflict of interest would not 'result in material diversion of traffic from air to surface transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding' " *Air Freight Forwarder Authority Case*, Order E-21056, July 10, 1964 (mimeo, p. 4), we expressed concern that the Board had not adequately explicated what we considered to be a significant departure from that policy, 391 F.2d at 301-05. While we pointed out what seemed to be still other weaknesses in the Board's opinion, 391 F.2d at 305-07, which reinforced our conclusion that further consideration was desirable, we nevertheless recognized that even the present record might "be sufficient for the Board to initiate a properly controlled experiment in the authorization of truckers as air freight forwarders, with the limitation on numbers and the reporting and other requirements an experiment would be expected to entail" 391 F.2d at 307.

The opinion on remand, *Motor Carrier-Air Freight Forwarder Investigation*, No. 69-4-100, April 21, 1969, attempted to deal with these objections. With respect to the number of authorizations, the Board emphasized "that it is granting only the applications before it and not passing upon any others," save for a declaration that it "should not deem the size, geographical extent, or general commodity rights of a trucker's surface operations or authority—of themselves—as factors showing that the trucker

should be barred from the air freight forwarding business." *Id.* (mimeo, pp. 3-4). The Board made clear, however, that this declaration meant just what it said and no more:

> But long-haul truckers of general commodities will not be granted air forwarding licenses routinely. Instead, each trucker applicant will be required to show that it will conscientiously promote air cargo and that its operations, either alone or in combination with others already licensed, will be in the public interest. The Board will not be satisfied with mere recitations; it will scrutinize each application (and any objection) to insure that these criteria are met. And the Board will maintain a close watch over the experiment through new and more detailed reporting requirements. As a final safeguard, the Board will reserve the power to suspend the processing of new applications and, if necessary, even to terminate outstanding licenses. This policy is being codified in proposed regulations issued concurrently with this order. For long-haul truckers who seek to become air forwarders, the rule will not be free entry, but monitored entry.

Turning to the matter of surface carrier participation, the Board reiterated its position that the second proviso to §408(b) of the Federal Aviation Act, 49 U.S.C. §1378(b) (1964), was inapplicable to air freight forwarding, not merely in precise terms as we had agreed, 391 F.2d at 302, but at all.[2] However, noting our recognition that

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[2] Some added support for the Board's position was furnished subsequent to its decision by Pub. L. 91-62 §1(2). (Aug. 20, 1969), 83 Stat. 103, amending §408(a) (5) of the Federal Aviation Act, which authorizes the Board to exempt any acquisition of a noncertificated carrier from the requirement of approval "to the extent and for such periods as may be in the public interest.".

"the Board might conclude, after studying the proposals of a particular surface carrier, that despite its conflicts of interest, the applicant will conscientiously promote air transport," 391 F.2d at 304, it found, after detailed examination of the record, that "[t]he three successful applicants have clearly met that test" and concluded that "[t]he time has come . . . to test the conflicts hypothesis in a controlled experiment." This was to be made possible by the detailed reporting requirements imposed on the three successful applicants, similar requirements proposed for imposition on other successful trucklng aspirants, and new reporting requirements proposed for the independents.

The rule-making proceeding initiated simultaneously with the order fell into two main parts. One part concerned applications of long-haul motor carriers of general commodities for air freight forwarding authority or for approval of control of air freight forwarders. The proposed regulations provide that such authority or approval may be granted,

> on an individual application basis, with or without hearing, upon a showing that (1) the applicant is capable of performing the proposed air transportation and of conforming to the Act and the regulations thereunder; (2) the applicant will conscientiously promote air cargo and will benefit air transportation; and (3) the applicant's operations, alone or together with those of other similar carriers granted air forwarding authority, will not result in creating a monopoly or monopolies and thereby restrain competition, or jeopardize another air carrier and will not otherwise be inconsistent with the public interest . . . .

Any applicant must show:

> (a) A plan to conscientiously promote air cargo. This showing shall include, *inter alia:*

(1) A statement as to whether the long-haul motor carrier plans to solicit existing surface customers for air cargo and, if so, the extent of such plans;

(2) A traffic estimate showing what traffic is newly-generated or presently shipped by surface means;

(3) An estimate of what portion of the long-haul motor carrier's existing surface traffic is subject to diversion to air;

(4) An estimate of beyond-terminal-area traffic moving by surface transportation over the routes of the long-haul motor carrier or via interline agreements; and

(5) A statement of the proposed air cargo sales force and facilities.

(b) A statement of the long-haul motor carrier's authority from the Interstate Commerce Commission or other regulatory agency, including a description of surface transportation authorized and offered at the stations at which air forwarding operations are proposed.

(c) A statement of any other advantages which would result from approval of the application.

Authorizations are to continue until they expire by their terms, the relevant regulations are terminated or revoked, or the Board in revocation proceedings finds that continued operation is contrary to the licensing criteria. The other part related to reporting. Long-haul motor carrier applicants who qualified in the future would be required to file reports similar to those imposed as conditions on the three successful applicants, see fn. 1. In addition, all

other air freight forwarders would be required to make additional reports, with the objective of placing the Board in a position where it will be able to obtain a rather complete statistical picture of the entire industry.

We find it unnecessary to deal with petitioners' contentions that since the Board failed to petition the Supreme Court for review of this court's decision, it was bound to give our views with respect to the policy concerning surface carrier participation in air freight forwarding greater weight than it did. Apart from the problem raised by the agency's likely inability to obtain certiorari to review an order of remand, cf. *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 383 (1965), and the possible bearing of Pub. L. No. 91-62, see fn. 2, we are satisfied that the nuance of difference between the Board's views and those intimated in our previous opinion did not affect its decision. Fully recognizing its responsibility to develop air transportation, the Board did not deny that it must consider the bearing of a prospective air freight forwarder's involvement in surface transportation; it said only that this should not constitute a bar. Here it satisfied itself that, in light of the plans of two of the applicants to conduct their air freight forwarding through separate companies and of the third to conduct its through a separate division with a management team recruited from the aviation industry and dedicated to air cargo's promotion, the applicants would not seek to divert potential air cargo to surface transport but rather would zealously promote it. Petitioners say the Board was too easily satisfied and contend that the regulations proposed in the rule-making proceeding demonstrate this. But the former issue was for the Board to decide and we cannot take the Board's professions with respect to its future policy so lightly as petitioners would have us, see *F. C. C. v. Schreiber*, 381 U.S. 279, 296 (1965). While the proposed regulations do not assure a hearing, they do permit any interested

person to object to any new authorizations on the ground, among others, of a belief "that the long-haul motor carrier or its affiliate will not promote air cargo." While it may indeed be difficult to establish this at the start, the reports to be filed by the three successful applicants and other long-haul truckers that may receive authority in the future will ultimately afford a basis for truly informed decision on an issue that now lies in the realm of conjecture.

Similar considerations require us to reject petitioners' contention that the Board's avowed limitation on the number of applications granted is simply a form of words. When an independent regulatory agency says that "long-haul truckers of general commodities will not be granted air forwarding licenses routinely" and that its policy toward them "will not be free entry, but monitored entry," a reviewing court must assume the agency means what it says, unless and until experience should indicate the contrary. We will expect the Board to be selective in accordance with its word. We would assume, for example, in light of the Board's expressed concern that the nation's three largest cities are now responsible for more than half of all air freight forwarder tonnage and the 10 leading cities for over three-quarters, whereas 101 of the 131 cities reported produced less than 5%, that it would prefer long-haul trucker applicants with well laid plans to develop the lesser markets, in contrast, e.g., to an applicant planning, as Consolidated Freightways is doing, to operate for the first year only in the four cities ranking highest in volume of air freight forwarder traffic, and would not multiply the latter type of authorization in the absence of a strong showing of public interest. In sum we expect that the Board will in time demand that the performance of the long-haul truckers as air freight forwarders should conform to the rationale stated for their authorization, and that if the "controlled experiment" proves disappointing,

new authorizations will not be granted and existing ones may be revoked. We anticipate also that in granting added authorizations to long-haul truckers the Board will take the condition of the independent forwarders into proper account. In performing these difficult tasks the Board will be immeasurably aided by the detailed reporting requirements imposed or proposed as a result of the remand. If deficiencies should emerge in the Board's performance, these can be brought before a court at an appropriate time.

While we have felt free to consider the Board's proposed regulations as casting light on its action in granting the three authorizations, as all parties have agreed to be proper, we have no power to terminate the rule-making proceeding with respect to the long-haul truckers, as petitioners ask, even if we had any will to do so. Although comments on the proposed regulations were due by May 23, 1969, the Board has not yet acted upon them, and review would thus be premature. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Neither would the situation be altered if the regulations with respect to long-haul truckers are adopted. These regulations, in contrast, to any new reporting requirements on the independents, do not compel petitioners to do anything they have not previously done or to refrain from doing anything they were previously permitted to do, as in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967). Petitioners will be affected by the regulations only when, as and if the Board grants further authorizations to long-haul truckers under them. We need not consider whether review could be had, or where, if the mere possibility of such grants were unlawful since, for reasons indicated, we do not believe this to be so. Failing that, review must await further grants pursuant to the regulations, by which petitioners might be aggrieved.

Insofar as the petition to review is addressed to Order 69-4-100, it is denied; insofar as it is addressed to the Notice of Proposed Rule Making, it is dismissed.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 21st day of April, 1969

MOTOR CARRIER-AIR FREIGHT FORWARDER INVESTIGATION : Docket 16857

OPINION ON REMAND

By Order E-25725 the Board authorized three long-haul motor carriers of general commodities to engage in air freight forwarding, either directly or through subsidiaries. Recognizing that the Board had previously restricted the entry of such long-haul truckers into the air forwarding business, the Board ruled that a new policy deserves a trial. Thereafter, in response to a petition for review filed by 19 air freight forwarders and their trade association, the United States Court of Appeals for the Second Circuit vacated the Board's order and remanded the case for further proceedings not inconsistent with the Court's opinion. *ABC Air Freight Co., Inc., et al. v. CAB,* 391 F.2d 295 (1968).

The Board then invited the parties to file briefs directed to the action which the Board should take in light

of the remand. In their responses, the Air Freight Forwarders Association and six direct air carriers contend that the Board should dismiss the proceeding or hold another evidentiary hearing; the applicants assert that they should be licensed immediately. Additionally, seven other motor carriers or motor carrier affiliates request leave to intervene and consolidation of their applications for forwarding authority. The Board has heard oral argument.

The threshold decision facing the Board is whether it must terminate the proceeding or reopen the record; or whether it can rule on the merits of the applications. In the Board's view, the Court's decision does not preclude the Board from licensing some or all of the four applicants before it now. According to the Court, the most serious deficiency in the Board's order was an ambiguity as to whether the Board established a policy of entry for all long-haul truckers or merely granted the applications before it. Reading the Board's opinion as a commitment to grant authorizations to all, the Court found the Board's opinion to be inadequate. But the Court stated clearly that it did not wish to be misunderstood as ruling that the present record might not be sufficient for the Board to initiate a properly controlled experiment in the authorization of long-haul truckers as air freight forwarders.

Nor does the Board believe that it should reopen the record as a matter of administrative discretion. The present record is well documented and reasonably current. It contains a complete picture of the air freight forwarding industry and of air freight through 1965 and, on some matters, mid-1966. No one suggests that the present prospects of air forwarders and air freight have changed materially since the record was closed. Of course, where, as here, the essential questions before the Board relate to economic predictions about the future, any record based upon past facts yields some uncertainties. But those parties asking for reopening do not suggest what, if any, evidence they

will present to alleviate that or any other problem. Accordingly, the Board concludes that it should base a final decision upon the present record.

Reviewing the record in the light of the Court's opinion, the Board believes that it can and should grant authority to the three applicants who received awards before.[1] In brief, the Board finds that those applicants' authorization will result in substantial public benefits, will not result in conflicts of interest which will interfere with the promotion of air cargo, and will not reduce effective competition by the existing independent air forwarding industry. The Board further concludes that the Congressional restrictions against surface carrier participation in airline operations do not disqualify the applicants from becoming air forwarders who solicit cargo to be transported by air. And the Board believes that its policy should continue to be one of granting authorizations which will contribute to the growth and development of air cargo, rather than one of protecting existing forwarders from competition.

The Board emphasizes, however, that it is granting only the applications before it and not passing upon any others. For other applicants, the Board tentatively concludes only that it should not deem the size, geographical extent, or general commodity rights of a trucker's surface operations or authority—of themselves—as factors showing that the trucker should be barred from the air freight forwarding business. But long-haul truckers of general commodities will not be granted air forwarding licenses routinely. Instead, each trucker applicant will be required to show that it will conscientiously promote air cargo and that its operations, either alone or in combination with

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[1] The fourth applicant, who did not receive an award in Order E-25725, will not be granted authority for the reasons stated in Part VII of this Opinion.

others already licensed, will be in the public interest. The Board will not be satisfied with mere recitations; it will scrutinize each application (and any objection) to insure that these criteria are met. And the Board will maintain a close watch over the experiment through new and more detailed reporting requirements. As a final safeguard, the Board will reserve the power to suspend the processing of new applications and, if necessary, even to terminate outstanding licenses. This policy is being codified in proposed regulations issued concurrently with this order. For long-haul truckers who seek to become air forwarders, the rule will not be free entry, but monitored entry.

We turn now to a detailed discussion of the reasons for our decision in light of the Court's mandate that we articulate our rationale more precisely and that we elaborate on our findings. Accordingly, this option supersedes our earlier one contained in Order E-25725. Except as modified herein, we will adopt the examiner's findings and conclusions in his initial decision, which is attached hereto.

I.

At the outset, the Board rejects the contention that the second proviso of Section 408(b) reflects a Congressional policy against surface carrier participation in the air forwarding business.

When Congress enacted the Civil Aeronautics Act of 1938, it intended to prevent the control of the struggling airlines by those engaged in a competing form of transportation. Following the pattern of the Motor Carrier Act, Congress included in Section 408(b) a second proviso which precludes a surface carrier from acquiring an air carrier unless the surface carrier shows that it can use aircraft to public advantage in its surface operations. The Board has repeatedly recognized that the proviso controls where a surface carrier seeks to "acquire" a direct carrier. And

although the proviso does not literally cover a surface carrier's request under Section 401 for authority to operate aircraft, the Board applies the second proviso's policies in certificate proceedings.

With respect to air freight forwarders, however, the Board has long taken a different view. In the original *Air Freight Forwarder Case*, 9 C.A.B. 473, 502 (1948), the Board ruled that "the second proviso does not apply in a case where the company of which control is acquired is an air freight forwarder." It went on to say:

> "We believe that Congress did not intend it [the second proviso] to be applicable. The language of the section is such as to indicate that it was directed to the case of control of a direct air carrier by a direct common carrier, or by a person controlled by, or controlling, such common carrier or affiliated therewith. The requirements laid down therein were obviously framed with reference to the experience of direct carriers and are at best inappropriate where indirect carriers are involved. * * *" (*Id.* at 503).

The Board's conclusion was judicially approved in *American Airlines v. CAB;* 178 F.2d 903, 909 (7 Cir. 1949) and was reaffirmed in the *Air Freight Forwarder Investigation,* 21 C.A.B. 536, 545 (1955) and 23 C.A.B. 376, 378 (1956).

In remanding the instant proceeding, the Court, which accepted the proposition that the second proviso did not apply "in terms" to indirect air carriers, suggested that "the Board is nevertheless obligated to consider the policies behind the proviso in regulating entry into forwarding"[2]

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[2] The Court cited *National Air Freight Forwarding Corp. v. CAB,* 197 F.2d 384 (D.C. Cir. 1952). But the District of Columbia Circuit

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(391 F.2d at 302). As support for its view, the Court referred to a long-standing Congressional policy about railroad and other surface carrier participation in different transportation modes. The Board has recognized repeatedly that the Congressional policy is applicable whenever a surface carrier seeks to acquire or to become a direct air carrier. *E.g., American Export Lines, Control,* 4 C.A.B 104, 106-107 (1943). But the Board has never read the Congressional policy as intended to control entry into the forwarding business.

Nor does the Board do so now. "When it passed the Act [the Civil Aeronautics Act of 1938], Congress was concerned only with direct carriers." See *American Airlines v. CAB, supra.* Indeed, Congress took pains to provide that the regulatory scheme covering direct carriers need not be applied to forwarders and other indirect carriers (present Section 101(3)). Similarly, in the Freight Forwarder Act of 1942, enacted when Congress turned its attention to surface forwarders, Congress did not legislate the rule cited by the Court; instead it allowed direct carriers

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[2] (Continued)
Court was there dealing with the contention that Section 408 in its entirety covers only technical "acquisitions" of control and, hence, was inapplicable where a railroad affiliate applied for forwarding authority in its own name and did not ask for approval of the previously-created control relationship (197 F.2d at 385-386; 9 C.A.B. at 510-511). In that situation, the District of Columbia Circuit Court rightly ruled as an alternative holding that "the Board may apply the policies of § 408" –not of the second proviso–"even where there is no technical § 408 control relationship." (197 F.2d at 386; see also American President Lines, 7 C.A.B. 799 (1947).) Moreover, in the 1952 decision, the Court noted without question the Board's refusal to apply the second proviso, as well as the Board's statement that the proviso "is 'directed to the case of control of a *direct* carrier by a direct common carrier * * *.'" (179 F.2d at 385-386, note 6. Emphasis supplied).

by rail, water, and highway to perform forwarding services through affiliates.[3] Against this background, the Board cannot impute to Congress an intent to establish like policies for direct carriers and for freight forwarders.

As a practical matter, the Board perceives no reason why the Congress should have imposed a statutory barrier against surface carrier participation in air forwarding. The statutory goal is to promote air cargo, and that task is a primary responsibility of the airlines. The forwarders are welcome auxiliaries, who supplement the airlines' efforts. The statutory provisions authorizing the Board to permit free entry into forwarding signify to us that the Congress recognized that the Board's duty towards air cargo is to protect competition—not competitors.[4] Today, competition in air cargo comes from the airlines, who promote 78 percent of the traffic, and the handful of forwarders who promote almost all the rest. In light of present-day conditions, there is no basis for any conclusion that surface carrier entry into forwarding will stifle the promotion of air cargo by the airlines. Nor, as we explain later, do we think that it will eliminate competition by strong independent forwarders. On the contrary, vigorous new entrants can promote competition in forwarding even if they replace a few other, ineffective competitors.

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[3] See Ownership of Stock in Freight Forwarders, 265 I.C.C. 73, 76-77 (1947); Calore Express Co., Inc., 87 M.C.C. 379, 384 (1961). As we understand it, under the Act railroads are not limited to controlling railroad forwarders. Rather, railroads are allowed to participate in highway traffic by controlling trucking forwarders, even in circumstances where the railroads cannot lawfully control truckers themselves.

[4] Notwithstanding the entrenched forwarders' requests, Congress has declined to abolish the free entry system for air forwarding. See H.R. 4859, 90th Cong., 1st Sess. (1967); H.R. 4181, 88th Cong., 1st

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As the history of forwarder regulation shows, the Board has always recognized these precepts. Initially, of course, when the forwarding industry was in its infancy, the Board's policies were influenced strongly by the fledgling air cargo industry's need to establish itself. Thus, in the 1948 *Air Freight Forwarder Case,* the record showed that the certificated cargo carriers transported only about 65 million ton-miles of air freight in 1947 (9 C.A.B. at 481). Those applicants who had solicited air cargo as agents were in a precarious financial position: Emery, whose freight revenues were among the largest, had not yet shown a profit (*Id.* at 491). Accordingly, the Board denied the applications of railroad affiliates to become forwarders, although it authorized letters of registration for surface freight forwarders and their affiliates, and for motor carrier affiliates.

When it decided the 1949 *Air Freight Forwarder Case (International),* 11 C.A.B. 182, the Board again granted authorizations for surface forwarders, surface forwarder affiliates, and motor carrier affiliates. In addition, the Board was faced with applications by railroad affiliates which had been denied authority in the domestic case. Finding that the railroad affiliates did not offer the same danger as in the domestic field, the Board approved their entry into international air forwarding.

The Board's nondoctrinaire approach is nowhere better illustrated than in the 1955 *Air Freight Forwarder Investigation.* Then holding that domestic forwarding authorizations should be issued to two railroad affiliates, whose

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[4] (Continued)
Sess. (1963); Hearings before Subcommittee No. 4 on Distribution Problems of the House Select Committee on Small Business, 89th Cong., 1st Sess. 103-121, 129 (Vol. 1, 1966).

applications had been denied in the 1948 *Case*, the Board was aware that airline domestic freight revenues and ton-miles had increased over 65 percent since the earlier Board decision (21 C.A.B. at 541). And although the individual forwarders' financial health was frail by today's standards (*Id.* at 598), the Board found that several vigorous forwarder enterprises had developed and that domestic competition by railroads should no longer be deferred.

Again, in the 1964 *Airfreight Forwarder Authority Case*, 40 C.A.B. 673, the Board refuted the argument that there was a presumption against granting authority to applicants having direct surface transportation interests. Rather, the Board characterized its policy as prohibiting "entry by surface carriers into the airfreight forwarder field where it appeared that such conflicts of interest would arise between air and surface operations as to result in material diversion of traffic from air to surface transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding. * * *" (*Id.* at 675). That, of course, is fundamentally a factual test.

In sum, the history of the Board's forwarder regulation is that as the air cargo industry has grown, the Board has narrowed its shield of protection enough to allow increased competition from surface interests. Only rarely during recent years have surface carrier requests for forwarding authority been denied on conflict of interest grounds.[5] In July 1965, however, the staff issued an order under delegated authority in which it adopted a restrictive

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[5] While in 1958 the Board denied REA's application for forwarding authority (Railway Express Agency, Airfreight Forwarder Application, 27 C.A.B. 500), the Board's consistent treatment of REA over the preceding decade shows that REA was regarded as unique, primarily because it was the largest nongovernment carrier

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view of Board policy and denied such a request. *Telstar Air Freight, Inc.*, Order E-22479. Within months after that unappealed staff action became final, the Board instituted this Investigation to consider whether long-haul motor carriers of general commodities should be allowed to participate in air forwarding.

The central question posed by the Court's remand is whether the Board is legally free to give an affirmative answer to that question. Since the Board does not regard its past policies as mandated by the second proviso, the Board believes that it may lawfully continue to shape and reshape those policies as a matter of judgment; it need not compile an evidentiary record to justify each adjustment of policy. Of course, the Board must remain faithful to the public interest commandments of the Act. So long as it does so, the Board believes that it can rely upon its judgment and experience as a basis for adapting its policies to the dynamic technology of the air cargo industry and to the needs of the public. In any event, the Board finds that the record here justifies a new policy.

II.

In finding that a new policy is needed, the Board is convinced that the three applicants' entry into the air forwarding business is likely to produce important public benefits. Indeed, as the Board found in its earlier opinion, the participation of strong new entrants like the applicants may be essential to achieve the full promise of air cargo.

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[5] (Continued)
of small-package traffic by all modes of transport. (See Airfreight Forwarder Authority Case, 40 C.A.B. 673, 674-675.) In contrast to REA's cases, the Board authorized United Parcel Managers Co. and United Parcel Service of America, Inc., which in turn owned 12 regional operating companies, to acquire Air Parcel, Inc., an air freight forwarder. (United Parcel Managers Co., Order E-7324, April 22, 1953).

To begin, there is no doubt that the air cargo industry stands on the threshold of a new era. Over the 1951-1965 period, domestic and international air freight ton-miles increased sevenfold. In the last year surveyed, 1965, domestic freight traffic increased over the preceding year by 26 percent; international traffic by almost 46 percent. The result is that U. S. domestic and international freight shipments reached about 1.7 billion ton-miles in 1965.

Yet despite that growth, the carriers' excess freight capacity has been increasing at an alarming rate. The domestic trunklines' unused cargo capacity, which had been less than a billion ton-miles before 1959, reached more than 3 billion ton-miles in 1965. Each year the carriers have found cargo enough to fill only about a quarter or less of their freight capacity, leaving the rest to be flown empty.

Unless air freight can achieve a dramatic breakthrough, it will lag even further behind available aircraft capacity soon. By 1970, the Nation's air carriers are expected to have a fleet of all-cargo aircraft capable of carrying 6.5 billion ton-miles of freight. Even without considering the additional freight capacity of combination aircraft, air cargo must expand several times to fill the airlines' pressing need for more freight.

Given adequate development, air freight can meet the challenge. One important factor is that air transportation no longer commands a premium rate *vis-a-vis* surface transport. The Board has previously found that between 1946 and 1966 motor carrier rates increased by 52 percent; and air freight rates decreased by 30 percent.[6] Motor carrier rates, particularly for small packages, are expected to continue increasing. With the advent of the larger jets, improved ground handling techniques, and

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[6] Airlift-Slick Route Transfer Case, Order E-26810, May 20, 1968 (mimeo page 7).

containerization, the ton-mile costs of air freight should continue to decline, thus narrowing the gap between surface and air transportation costs. Even if motor transportation rates remain less than air freight rates, shippers will increasingly find that air transportation is economical because it produces savings in overall distribution costs. Based upon these considerations, one forecast of record estimates that domestic air freight will more than double by 1970.

But that breakthrough in air freight will not come about from lower rates alone. Both the direct air carriers, and the forwarders who generate over 20 percent of air freight traffic, must increase their promotional efforts. They must awaken shippers to the new low rates and to the savings in warehousing and distribution costs and other advantages of air over surface transportation. And they must make massive investments in containerization, computerized billing systems, and sophisticated communications networks. One fact is inescapable: the needed promotional campaigns and investments will require substantial capital expenditures.

There is reason to doubt that many existing independent air forwarders can afford the necessary sales effort and capital investments. Most forwarders are thinly capitalized. Of 124 forwarders reporting assets in 1966, 112 had less than $2 million in total assets; 102 had less than $1 million; 85 had less than $500,000; and 48 had less than $100,000. And most forwarders, who already carry heavy debt loads, will have difficulty raising outside capital.

It is true that the industry includes many substantial forwarders. But these large forwarders cannot be relied upon to carry the burden alone. Even Emery, the forwarder which controls 30 percent of industry revenues, concedes that if it could have budgeted more money for promotional efforts, it could have generated more air freight. If the

dominant company in the industry must curtail its promotion of air freight because of finances, surely the other forwarders will be even more limited on funds.

There is thus a demonstrated need for new, able, and well-financed enterprises to enter the air forwarding business. The applicants have come forward to fill that role. Ideally, perhaps, the Board might have been given the opportunity to choose between the applicants and other equally knowledgeable and large companies having no connections with long-haul surface carriers. That possibility would have raised the question, posed by the Court, whether the greater sales effort called for in the future can be better afforded solely by new independent forwarders. But although the Board's liberal entry policies have been outstanding for many years, few large independents have asked to become forwarders. Of the 11 independents with applications now on file, none are as large as the 17 largest forwarders. All have less than $190,000 in total assets; and seven have less than $75,000.[7] If the Board spurns the trucking-related applicants now, it will be left with nothing better than the bare hope that other applicants, equally-qualified but without long-haul surface connections, will emerge someday.

Of course, the Board would not license these applicants if it concluded that they would experience a disabling conflict of interest between their air and surface operations—a conflict depriving them of an incentive to promote air freight. In Part III of this Opinion, however, the Board has spelled out the reasons why it finds the very opposite to be the case. Given the applicants' demonstrated intention to promote air cargo conscientiously, they have the resources needed to aid in accomplishing that goal.

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[7] As of March 13, 1969. In the preceding six months, the Board licensed only one applicant whose total assets were in the $1 million category. Included among the so-called independents are intrastate and regional truckers.

About this there can be no real dispute. As the examiner found, the applicants are large, well-financed, profitable organizations. They will provide sophisticated management, experienced personnel, and substantial additional air forwarding facilities. They plan aggressive promotional programs combining promising, new sales approaches with the formulas which have proven successful for forwarders like Emery. And the applicants will have access to nationwide communications networks and to computerized billing and reporting systems, thus satisfying shippers' demands for an efficient and reliable service. All told, the applicants will be a potent force in developing new air freight—even in the 10 leading cities in which one or more applicants will compete with existing forwarders.

But entirely apart from those thriving markets, the applicants also have an exceptional ability to stimulate air freight in underdeveloped cities. Today, the Nation's three largest cities account for over one-half of all freight forwarder tonnage; the 10 leading cities are responsible for over three-quarters. Conversely, among 131 cities reported, the lowest ranking 41 cities produced only one-tenth of one percent of the traffic; 101 cities produced less than five percent. This overconcentration of forwarder activities is obviously inimical to the development of a truly national air freight transportation system.

Yet neither existing nor new independent air forwarders can be relied upon to develop the less productive cities. It is true, of course, that Emery and some other forwarders have opened sales and operating stations in some of those cities. As Emery has discovered, however, those stations incur average direct transportation costs per pound far in excess of those experienced at more lucrative stations. Consequently, these secondary markets may not be directly profitable. The thinly-capitalized independent companies now applying for permission to enter the forwarding business are not equipped to make their mark in the underdeveloped cities. This means that Emery and a relatively

few other forwarders will continue to dominate the forwarding business in those cities—thus depriving the cities of the very competition which they need to harvest their full freight potential.

The applicants are the most likely candidates to provide that needed competition. First, they are financially strong enough to open new air-only terminals in cities where separate facilities are needed, though initially unprofitable. Second, where separate air-only stations are not immediately practical, the applicants can begin by basing air forwarding personnel at the existing terminals of their surface affiliates. By sharing those existing terminals with the surface operations, the applicants can reduce the heavy overhead costs attributable to their air freight activities, thereby making service to smaller cities more feasible.

The applicants have not only the capacity to begin operations in the less promoted communities, but also the intention to do so. Navajo Freight Lines plans to begin services at terminals in 13 cities, six of which are not among the top 10.[8] Although CF Air Freight will limit itself for the first six months or a year to operations at the four largest cities, it intends to open two more stations each year thereafter. The third applicant, P.I.E. Air Freight Forwarding, will open air-only stations in 14 cities and will offer direct air forwarding service through truck terminals in 16 other communities. In all, the air forwarding arms of the applicants will offer immediate air forwarding services to 21 cities not among the top 10 traffic generating points, and to 12 cities not among the top 20. More cities will receive service later.

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[8] In listing Navajo's initial stations, the examiner inadvertently omitted to mention Philadelphia and Phoenix.

The increased competition which the applicants will provide in the intermediate-sized cities can be expected to stimulate an immense growth in air freight. By comparison with the 10 leading air freight centers in terms of comparative economic indicia, the intermediate-sized cities' freight traffic is grossly and disproportionately small. Lack of vigorous, competitive promotion is plainly one cause. The applicants' entry into these markets will provide a long overdue competitive spur. Not only will the increased competition aid both shippers and the airlines, but it will probably generate new freight far exceeding any diversion from independent forwarders. As a result, the applicants will not jeopardize the able independents' operations in underdeveloped markets, but may actually benefit them. If our expectations prove false, the Board will retain the option not only to suspend or terminate the applicants' authorizations, but also to limit them geographically.

Finally, the applicants' authorization may increase the chances of air freight's message being carried to smaller cities in which no air forwarder will operate for many years. Regrettable as it may be, a substantial number of cities do not possess a freight potential adequate to support direct forwarder operations. Unless they are adjacent to the terminal area of larger cities, those cities must depend upon coordinated truck-air transportation. Although smaller cities are linked to airports by surface transportation, effective intermodal transportation will not come into being unless truckers gain an incentive to facilitate combined air-surface shipments. As explained in the next section of this Opinion, our decision today will go a long way towards providing truckers with that incentive. Henceforth, we believe, the applicants will be able to cooperate with their surface affiliates (and other truckers who interline traffic with those affiliates) to tap shipping sources located beyond the metropolitan areas.

In sum, the Board believes that the applicants' entry will stimulate the growth of air cargo from several sources: metropolitan areas now being served by many existing forwarders; other cities in which the applicants' competitive force will stimulate a lagging freight development; and smaller cities which will depend upon a more vigorous use of coordinated truck-air interline operations. In each area, the applicants' authorizations will help to realize air cargo's full promise.

III.

Our 1967 findings that important public advantages will result from motor carrier entry into air freight forwarding were said to have been undermined by the conflict of interest problem. The Court was dubious that the entire trucking industry could be found immune to conflicts. Nevertheless, the Court recognized that the Board might conclude, after studying a particular surface carrier's proposals, that the carrier will conscientiously promote air transport. The three successful applicants have clearly met that test.

To illustrate, CF Air Freight, a subsidiary of Consolidated Freightways, plans to conduct its operations autonomously. It will establish its own sales organization, with personnel developing specialized air freight marketing programs. With some exceptions listed by the examiner, it will function as a separate company in fact as well as form. Its president will report directly to the president of the holding company; in other respects it will be independent of any motor carrier in the Consolidated Freightways system. Indeed, the holding company's president stated unequivocally that CF Air Freight's salesmen will solicit the affiliated truckers' customers for air freight.

P.I.E. Air Freight Forwarding, a subsidiary of Pacific Intermountain Express Co., plans to conduct operations

in 14 cities from separate airport terminals, stocked with air freight equipment and staffed by personnel specializing in air freight. At 16 other points, it will employ driver salesmen who will be headquartered at a motor carrier terminal but will devote themselves exclusively to air freight. P.I.E. Air Freight will also offer air freight at other locations using its parent's facilities and personnel. While in comparison to CF Air Freight this applicant will offer a coordinated truck and air service, it will also be operated independently and will not refrain from soliciting customers of its motor carrier parent.

Unlike the other two successful applicants, Navajo Freight Lines proposes to establish its air forwarding enterprise as a separate division within the corporation. As a guarantee of the division's commitment to air forwarding, Navajo has assembled a management team drawn from the aviation industry and dedicated to air cargo's promotion. Navajo will commence air forwarding operations at surface facilities, with some new air forwarding pick-up equipment, but will establish separate facilities as traffic growth dictates. Its 25 full-time air freight salesmen, together with other air forwarding staff, will be directed to solicit potential customers whether or not they patronize Navajo's surface operations.

These applicants' proposals cast doubt upon the conventional conflicts shibboleths. While the examiner assumed that motor carriers would prefer to carry "all" traffic by surface means, these applicants testified to the contrary. According to them, truckers now carry the so-called "small-shipment traffic" at a loss or minimal gain. As a result, they say, the applicants and their affiliates will be eager to divert small-shipment traffic to air if they can thereby harvest the forwarders' profit.

In judging the good faith of the applicants' position, the Board need not find indisputable proof of the assertions

about small-package traffic. The record contains several ICC studies showing the comparatively high cost of that traffic. Moreover, the Interstate Commerce Commission has stated as a matter of public record both its concern over the small-package problem and its recognition that many motor carriers believe that small-package traffic is noncompensatory.[9] These matters lend enough credence to the applicants' words to justify putting the question to the test of actual experience. In their special quarterly reports to the Board, the applicants will be asked to supply detailed information about both their own and their surface arms' small-shipment traffic. By comparing the trends in small-shipment traffic for the air and surface enterprises of the same company or corporate system, the Board will be able to make a truly informed judgment whether the surface carrier applicants keep their promise to divert a substantial portion of that traffic to affiliated air freight forwarders.

In this connection, the Board has considered documents which suggested to the Court that motor carriers would be unwilling to divert small shipments to the airlines. That small shipments comprise a large percentage of motor carrier shipments is not, to our minds, dispositive. In the case of Consolidated Freightways, for example, while less-than-100 pound shipments constitute almost 28 percent of total shipments, they account for less than 2 percent of tonnage shipped and only 6 percent of revenues. With motor carrier revenues increasing over 8.6 percent annually, truckers are not likely to view a loss of small-shipment revenues as catastrophic. This is particularly true if the truckers believe that those revenues cannot be translated into profits, or cannot match the profits which their air forwarding arms will earn through shipping that traffic by air.

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[9] See *e.g.*, LTL Cor Rates–Between East and Territories West, 326 I.C.C. 174, 177 (1966); General Increases–Eastern Central Territory, 316 I.C.C. 467 (1962).

The applicants' promotion of air transportation will not be limited to small shipments. Strictly speaking, of course, the licensing of a trucker or its affiliate as an air forwarder will not reduce the trucker's potential conflicts of interest about shipments which can be carried profitably by surface. But it *will* reduce the trucker's incentives to thwart the diversion of that traffic to air. Without air forwarding authority, a trucker can earn nothing by turning shipments over to air carriers and, hence, has no reason to do so. If the trucker or its affiliate is awarded air freight forwarder authority, however, the trucker will have incentives to permit air traffic to grow. As an air freight forwarder or its affiliate, the trucker will have a stake in the air forwarding business; the corporate system can consolidate shipments and realize earnings from the spread between the air carrier rates for small and large shipments.[10] It is clear that these truckers can do much for air transport if they cooperate with their air arms' activities, instead of battling against any diversion of their surface traffic to air.

The Court's concern about conflicts was not directed to a controlled experiment, limited to truckers who show a plan to promote air freight conscientiously. Thus, in questioning whether truckers would boost air freight over surface in marginal cases, or would support efforts to expand air forwarding terminal areas, the Court had in mind cases where the trucker-forwarder would be required to balance the economic interests of both its surface and air activities. The successful applicants here, however, are organized as air-only components; each is insulated from the trucking operation both by organization and by a mandate to solicit the same customers. Similarly, when the

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[10] The Board does not adopt the examiner's assumption that air forwarding may not be as profitable as motor carriage. Insofar as the record illuminates this question, it tends to show that some forwarders have rates of return which are higher than the applicants'.

Court wondered whether independent forwarders would remain vigorous enough to compete with motor carriers and thereby insure that the truckers would promote air freight, the Court's fears premised "a large-scale invasion by motor carriers * * *" (391 F.2d at 304). The limited number of trucking-related forwarders to be licensed will have no chance to silence the competitive voice of independent forwarders—and certainly not of the airlines, who promote nearly four-fifths of interstate air cargo.

It is still possible, of course, to speculate pro and con whether the conflict of interest hypothesis has any remaining vigor for truckers or affiliates like the three applicants. The lessons of the past teach some skepticism. By 1964, sixty-two percent of companies engaged in air freight forwarding were surface carriers or their affiliates. Yet they have not dominated air forwarding; the preeminent air forwarder is an independent (Emery) who captures the lion's share of total industry revenues. On the other hand, the surface carrier-air forwarders have not failed to promote air traffic; they include a number of leading air forwarders.[11] While few if any of the existing surface carrier-air forwarders have surface rights as competitive with air as those of the long-haul truckers, the former's entry into air forwarding was also once opposed by air transportation's defenders.

The time has come, the Board believes, to test the conflicts hypothesis in a controlled experiment. Each applicant has given persuasive evidence of its intention to promote air cargo. Each has offered a different organizational plan to guard against conflicts with the related

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[11] Though one exhibit (BOR-1) purports to show that independent air freight forwarders have been more productive than surface-affiliated forwarders, the inclusion of Emery in the former group distorts the comparison and renders it meaningless.

surface operation. Only experience can verify or disprove the applicants' promise, or indicate whether one's organizational format is sounder than another's. During the experimental period, the Board will receive from the applicants special reports showing whether the applicants are stimulating new off-line business, increasing traffic from outside present terminal areas, and receiving new traffic from their surface divisions or affiliates. That information will enable the Board to answer the conflicts question on the basis of fact, not surmise.

If other trucking-related enterprises can show that they are equally dedicated to air cargo promotion, they too will be eligible to participate in the experiment under the terms of the proposed regulations issued today. As the regulations make clear, however, only applicants whose proposals affirmatively show promise of conscientious promotion will be licensed.

IV.

The applicants' entry into air forwarding is also opposed on the grounds that it will supposedly decimate the existing air forwarder industry. That contention is advanced primarily by the Air Freight Forwarders Association, representing the American Express Company and 20 of the other 24 largest forwarders.[12] The Board must reject the argument.

The record contains little evidence designed expressly to answer the impact question. The forwarders and their

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[12] The record shows 22, not 21 members of the Association; but two members merged with each other last year. Airborne Freight Corp., Order 68-9-140, Sept. 27, 1968. Two other Association members merged into firms which were not originally part of the Association. A fourth Association member changed its corporate name.

allies did not present any diversion estimates; and they do not offer to do so now. Although the applicants sponsored shipper witnesses who testified on this subject, the Board agrees with the examiner (Tr. 78) that the shippers' testimony is entitled to little weight pro or con.

In these circumstances, the Board is called upon not merely to consider the facts of record, but also to draw inferences from them, taking into account the Board's accumulated experience. Such judgments about the future necessarily involve elements of uncertainty. That is particularly true when, as now, the regulatory action "contemplates a proposed development, new, not existing," requiring a type of judgment going beyond "the mere evaluation of past facts * * *." See *American Airlines v. CAB*, 192 F.2d 417, 420 (D.C. Cir. 1951). So, although the Board cannot foretell the answer to the impact question with mathematical precision, it also cannot escape the duty to determine the reasonable probabilities.

As we see it, those probabilities are heavily in favor of the examiner's conclusion that "[t]he market potential is large enough, if developed, to support the existing forwarders, the applicants, and a substantial numer of additional forwarders * * * ." The examiner's assessment rested only partially on the top 10 forwarders' operating statistics. In addition, the examiner also correctly recognized that the history of the entire forwarding industry's financial growth justifies allowing new competition, not preserving the status quo.

One excellent guide to the forwarding industry's ability to withstand competition is the record of its growth since the 1955 *Investigation*. Then, as now, the Board heard the incumbent forwarders argue that the entry of surface-controlled applicants (two railroad affiliates) would destroy competition. At that time, the evidence for the test year (1953) showed that forwarders had shipped only 30,500

tons of freight and had gross revenues of $13.5 million. Only Emery had a substantial overall profit ($407,000) and only six other forwarders earned overall profits between $10,000 and $30,000 (21 C.A.B. at 598, 656-657).

In contrast, by 1964, the forwarding industry increased its cargo shipments by nearly sevenfold, to 200,000 tons of cargo. By 1965, the industry's gross revenues exceeded those of 1953 by 12 times, equalling $163.6 million. And by 1965 the number of forwarders earning profits of $10,000 or more on forwarding operations was 35, of whom 16 earned between $10,000-$30,000, nine earned between $30,000-$100,000, seven earned between $100,000-$300,000, and three earned over $475,000. Emery's profits were over $5.4 million.

In the 1955 *Investigation*, when it rejected the forwarding industry's pleas for a protectionist policy, the Board found that "several vigorous successful forwarder enterprises have already developed" and that the railroad-controlled forwarders would encourage competition (21 C.A.B. at 545). Although the railroad-controlled forwarders did not implement their authority, the number of authorized forwarders has increased from 43 at the time of the *Investigation* to 137 in 1966. Despite this heightened competition—or, more likely, partly because of it—the forwarding industry has become much more affluent. In this context, it would be illogical for the Board to reverse its course by adopting a protectionist policy found unjustified over a decade ago.

Moreover, the Association's arguments about the applicants' supposed ability to dominate forwarding are greatly exaggerated. Considering the applicants' plans to conduct their air forwarding ventures as independent enterprises, the crucial facts relate to the size of those operations, not of their affiliates' surface services. The record shows that P.I.E. Air Freight Forwarding anticipates first-year revenues

of $4.2 million; CF Air Freight, of $1.5 million; and Navajo Freight Lines, of $1.8 million. In 1965, eight of the Association's members grossed over $4 million; 13 members (and one nonmember) grossed over $1 million. With the industry's tremendous growth rate continuing, other forwarders will have an opportunity to reach the million dollar mark before the applicants begin operations this year or next. Contrary to the examiner's finding, these stronger forwarders may not suffer even "minor losses" with the entry of the applicants into competition.

As to most of the remaining, smaller forwarders, the examiner prophesied that some may be initially injured but will be strengthened in the long run by the addition of strong new forwarders like the applicants. Even that initial injury is open to question. Many smaller forwarders offer a specialized service in particular commodities or tailor their operations to unique needs of certain shippers. Even among forwarders who will compete with the applicants, little or no diversion may result. On an industry-wide basis, the three applicants' aggregate initial revenues are anticipated to be equivalent to less than five percent of the independent forwarders' 1965 revenues—and less of their 1969 or 1970 revenues. Part of the applicants' revenues will not represent diversion; they will come from newly-generated business. All in all, for the overwhelming majority of forwarders, the Board believes that the applicants will stimulate so much new freight that they will contribute to the existing forwarders' continued growth—and not undermine it.

Obviously, a few of the weakest forwarders may discontinue operations after the long-haul truckers enter the field. Notwithstanding the examiner's speculation, however, it cannot be said that the demise of those forwarders will be hastened by that new competition. Taking advantage of the Board's free entry policy and the industry's low initial capital requirements, some small companies

have begun forwarding businesses which are ill-conceived, inadequately financed, and poorly managed. To those ventures, it makes no difference whether competition comes from the applicants or from the many large independent forwarders. Whether or not the applicants and other truckers are licensed, those few weak forwarders will discover that competition is inevitable and inevitably disastrous.

The Board finds no reason to believe that air forwarding will be inundated by long-haul truckers and railroads. First, so far as truckers are concerned, only two long-haul truckers other than the applicants and their affiliates applied before our September 1967 decision to become or to acquire air forwarders; only 10 more applied thereafter. Second, our monitored-entry policy will be selective as to those truckers who can qualify to become forwarders. Moreover, our proposed rules provide that a trucker forwarder must make an appropriate showing "that its operations (either alone or together with other similar carriers granted air forwarding authority) will not result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier, or will not otherwise be inconsistent with the public interest." Finally, contentions regarding railroads are to be evaluated in proceedings regarding railroads.

In the final analysis, the Board must look ahead and give its opinion whether air transportation will benefit more from increased competition or from protectionism. In our view, the case for protectionism is far more speculative than the case for competition. And to the extent necessary, competition is also the preferred statutory goal.

V.

Airlift asserts that the applicant will gain control of most air cargo and, by threatening to withhold such cargo from the direct air carriers, will be able to pressure the

direct air carriers to grant rate concessions. But for the reasons already explained, the Board believes that trucking-related forwarders will not dominate air cargo. Nor will they be likely to try to act in concert in negotiating with the airlines. Rather, individual trucking-related forwarders can be expected to compete vigorously with each other, and also to face strong competition from independent forwarders and the independent airlines. Hence, as the examiner correctly concluded, the argument espoused by Airlift "is based on assumptions not in accord with the facts of present day air transportation".

VI.

The applicants' authorizations will be made subject to the conditions spelled out in the accompanying order. While these conditions will enable the Board to monitor and maintain control over the experiment, the Majority does not believe that the requirements will create procedural difficulties.

The reporting condition will enable the Board to monitor the experiment closely. Whereas independent forwarders now file their reports under Part 244 semi-annually, the applicants will file their special reports quarterly. They will be directed to provide new, additional traffic and station information which will show whether they are promoting air freight from new, untapped sources. At least some of the independent forwarders will file the more detailed reporting information so that the Board can evaluate the operations of independent and trucker-affiliated forwarders on a comparable basis.

Together with the Part 244 filings by independent air forwarders, the applicants' filings will show if the applicants' operations have any undue competitive effect upon the independent forwarding industry. We do not anticipate that our staff will encounter difficulties in analyzing

the reports promptly and in keeping the Board fully informed. Conditions in the applicants' licenses will give the Board power to protect existing forwarders by restricting, suspending, or terminating the applicants' authorizations if necessary. Unless the experiment ends sooner, the Board will reevaluate it at the end of five years.

The new regulations incorporate similar safeguards. In order to consider the possibility that the new reporting regulation may burden forwarders, the Board has invited parties to the rulemaking proceeding to comment on this point and to submit proposals to except smaller forwarders from the new rule.

VII.

Although the Board has found that licenses should be granted to three of the applicants, it has reached a different conclusion regarding the fourth applicant, D. C. International, Inc.

In Order E-25725 the Board deferred action on D. C.'s application because National City Lines, Inc., a motor carrier holding company whose acquisition of control of D. C. had been approved by the ICC, had not applied for Board approval of the control relationship. Thereafter, D. C. and Los Angeles Seattle Motor Express, Inc., a major West Coast trucker, agreed to merge with and into T.I.M.E. Freight, Inc., another transcontinental motor carrier. As a result of this merger, T.I.M.E. Freight will change its name to T.I.M.E.–D.C., Inc., and will be controlled by National City Lines. On March 25, 1968, the parties submitted a petition requesting both substitution of T.I.M.E. Freight in lieu of D.C. as the party-applicant, and approval of the control and interlocking relationships.

As we see it, these events make D.C.'s present application moot. D.C.'s promotional plans, which were the

weakest before us, were premised upon the corporate organization existing at the time of hearing. There has been no opportunity to explore on the record what changes may result from the major corporate reorganization. Accordingly, we find that D.C.'s application should not be granted, although the new carrier can refile a new application under our proposed regulations.

VIII.

The Board will deny the motions of seven long-haul truckers or trucking subsidiaries to consolidate their applications for forwarding authority with this proceeding. Similarly, we will deny the request of four of those carriers for permission to intervene.

Plainly, movants are not entitled to consolidation or to intervention as a matter of law. Under the Board's Rules of Practice, motions to consolidate must ordinarily be filed by the time of the prehearing conference and must ordinarily relate to an application pending by that time. Requests for intervention must be filed by that date too. All the motions here were filed after the Court's remand. One motion pertains to an application filed eight months after the prehearing conference and after the hearings began. The other motions concern applications that were not submitted until after the Board published its first opinion.

While the Rules allow the Board to grant consolidation or intervention if the movants show good cause for their failure to file on time, the movants have not given ample justification here. In essence, their position is that the Court remand changed the ground rules and that, for the first time, the applicants' applications and the movants' applications have become mutually exclusive. We disagree.

Of course, the Board has discretion after a Court remand to reopen the record, to allow new interventions, and to consolidate the original applications with subsequently filed ones. But where, as here, the Board can cure the Court's objections on the basis of the existing record, it is not obligated to hold new hearings simply to convenience newcomers like the movants. That is particularly so since the applications are not mutually exclusive. The Board's decision today does not foreclose the movants' entry in later proceedings. Under the Board's proposed regulations, movants will be entitled to have their applications processed under the same criteria applied to the three successful applicants here.

The Board's decision not to limit the experiment to the three applicants ends any real likelihood that the experiment will create unfair dislocations within the motor carrier field. Actually, apart from the applicants and the movants, only five long-haul truckers have been interested enough in air forwarding to file applications. In these circumstances, any possibility that the movants or others will be prejudiced by later Board action closing the class is remote and speculative.

In sum, to withhold the applicants' licenses now would be unfair both to them and to the public. The applicants have waited three years for their authorizations, expending substantial sums of money in the process. But more importantly, shippers also await the benefits which the applicants' authorization will bring. As we see it, any additional delay cannot be squared with the public interest.

IX.

The last issue to which we turn is the Air Freight Forwarders Association's request for a moratorium. According to the Association, the Board should hold its action in abeyance while it assesses the effect of the new terminal

area policies, the progress of the Trade Simplification Act of 1968, and the renewed promotion of joint airline-truck agreements under Section 1003 of the Act. The Association's arguments are unpersuasive.

The Board has every intention to continue processing forwarders' requests to expand their pick-up and delivery services beyond presently defined terminal areas. The Board has granted many of those requests since judicial decisions clarified the Board's authority nearly two years ago.[13] Our experience shows, however, that expanded terminal authority for air forwarders is not and will not be a panacea. Many potential air freight markets lie outside the expanded terminal areas defined in forwarder tariffs approved or presently pending. And both inside and outside terminal areas, the competition brought by vigorous, new entrants like the applicants will still be beneficial.

Proposed legislation known as the Trade Simplification Act of 1968 was introduced in the 90th Congress but was not enacted. Whether similar legislation will be introduced in the 91st Congress is unknown. Even if enacted, however, that legislation's main significance here is solely for joint rates between truckers and forwarders—in international transportation only. Confirmation of the legislation's limited impact here is supplied by the fact that the 1968 bill's primary advocate, the Department of Transportation, has taken a position favoring motor carrier entry into air forwarding.[14]

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[13] *Law Motor Freight, Inc. v. CAB*, 364 F.2d 139 (1 Cir. 1966); *National Motor Freight Traffic Assoc., Inc. v. CAB*, 374 F.2d 266 (D.C. Cir. 1966). Certiorari was denied in both cases on May 15, 1967, 387 U. S. 905.

[14] The Department requested leave to file its Statement of Position as an otherwise unauthorized document. Considering the Department's statement of its reasons for filing late, and the lack of prejudice to

(Continued)

Renewed promotion of joint agreements between airlines and truckers under Section 1003 of the Act will not moot the need for the applicants' services. In the past, very little traffic has moved under airline-truck agreements. The record is filled with recriminations about why that is so. But the ultimate reason is economic. Most airline-truck shipments have involved a relatively short surface haul. So long as surface carriers can earn nothing for the longer air journey, they have no incentive to turn shipments over to airlines. To delay our decision will only perpetuate the present, unsatisfactory situation.

We have reviewed the parties' remaining contentions and find that they do not alter our decision. In view of the foregoing and all the facts of record, we find:

1. That CF Air Freight, Inc., and Navajo Freight Lines, Inc., are capable of performing air transportation as domestic and international air freight forwarders, and that P.I.E. Air Freight Forwarding, Inc., is capable of performing air transportation as a domestic air freight forwarder, and that all are capable of conforming to the provisions of the Federal Aviation Act and the Board's rules and regulations thereunder.

2. That (a) the authorizations of CF Air Freight, Inc., Navajo Freight Lines, Inc., and P.I.E. Air Freight Forwarding, Inc., as air freight forwarders, and (b) the control of CF Air Freight, Inc., by Consolidated Freightways, Inc., the control of P.I.E. Air Freight Forwarding, Inc., by Pacific Intermountain Express Co., and the control of National Air Freight Forwarding Corporation by Pacific

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[14] (Continued)
any party, we will accept the Department's document. Correspondingly, we will deny the Air Freight Forwarders Association's motion to strike, but will accept its reply pleading.

Intermountain Express Co., will not be inconsistent with or adverse to the public interest and will not result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party thereto.

3. That CF Air Freight, Inc., and Navajo Freight Lines, Inc., should be authorized to perform air transportation as domestic and international air freight forwarders and that P.I.E. Air Freight Forwarding, Inc., should be authorized to perform air transportation as a domestic air freight forwarder, each for a period of five years (subject to the provisions of subparagraphs 7(a) and 7(b) of the attached order).

4. That approval should be granted to the control of CF Air Freight, Inc., by Consolidated Freightways, Inc.; to the control of P.I.E. Air Freight Forwarding, Inc., by Pacific Intermountain Express Co.; and to the control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., the last for a period of five years (subject to the provisions of subparagraphs 7(a) and 7(b) of the attached order).

5. That the interlocking relationships between the officers and directors of Consolidated Freightways, Inc., and CF Air Freight, Inc.; of Pacific Intermountain Express Co., and P.I.E. Air Freight Forwarding, Inc.; and of Pacific Intermountain Express Co., and National Air Freight Forwarding Corporation, are not adverse to or inconsistent with the public interest and should, therefore, be approved.

6. That the approval of the control and interlocking relationships described in paragraphs 4 and 5 above should be subject to the provisions of Part 251 of the Board's Economic Regulations now in effect and as hereafter amended.

7. That the authorizations and approvals granted herein should be subject to the conditions contained in the attached order.

8. That the Board should retain jurisdiction over this proceeding for the purpose of reviewing at any time the approvals and authorizations granted herein and of imposing at any time, with or without hearing, such other conditions as the Board may find just and reasonable.

9. That the application of D. C. International, Inc., and the application of T.I.M.E. Freight, Inc., for substitution as party-applicant and for other relief, should be dismissed without prejudice.

10. That the motions to consolidate filed by ILM Freight International, Inc., Roadway Express, Inc., Western Gillette, Inc., Wilson Air Freight Forwarding Systems, Inc., by Gateway Transportation Co., Inc., and Gateway Aviation Co., Inc., by Yellow Transit Freight Lines, Inc., *et al.*, and by Mercury Motor Express, Inc., should be denied; and that the petition of the first four named movants for leave to intervene should likewise be denied.

11. That the motion of the Department of Transportation to file a statement of position should be granted; and that the Air Freight Forwarders Association's motion to strike the Department's pleading should be denied, but should be accepted as a reply thereto.

An appropriate order will be entered.

CROOKER, Chairman, MINETTI, GILLILLAND and ADAMS, Members, concurred in the above opinion.
MURPHY, Vice Chairman, filed the attached dissent.

MURPHY, VICE CHAIRMAN, DISSENTING:

Without further evidentiary hearings, the only sound course of action open to the Board, in my judgment, is to deny the pending applications and to terminate this investigation. I am not satisfied that the revised findings are dispositive of the concerns articulated by the Court or that they can find convincing support in the record.

The "monitored entry" system as proposed by the majority consists, in my opinion, more of shadow than of substance. Pragmatically speaking, we cannot hold the gate against the tide of large, well financed applicants from the long-haul trucking industry and the railroads which will follow promptly upon entry of the order in this case.

The element of this case which has most concerned me is the conflicts of interest which will face trucker-forwarders. That such conflicts exist is undeniable. Recognizing this fact, the Board has endeavored to devise a system of rules and reporting regulations to cope with the problem. However, I fear the proposed reporting rules will lead us into a procedural morass as well as impose an unbearable burden on all parties in interest. Better that we take a hard look at the policy problem, in light of the Court's commentary, in a reopened evidentiary hearing.

Insofar as the Court was concerned about impact on the air freight forwarding industry, the record now is the same as it was when the question was before the Court. The majority's revised findings on this important issue are of modest solace to those forwarders who will be put out of business by the new trucker entrants and to those others who have literally created the business and whose potential growth may be seriously undermined.

I can well understand the truckers' motivation to enter air freight forwarding which is a relatively new and dramatically expanding field. It is patent that the largest volume of future freight available for air service is that pool now carried by surface modes. Air freight is now in a period of rapid growth whereas the surface modes have reached a plateau of maturity with their future growth keyed to annual increases in the economy. The availability to air of traffic presently moving by surface modes far exceeds any new traffic that air carriers might develop. Hence, the question is not so much what the trucks can do for air transport but rather what air transport authority can do for the trucks. The majority opinion seems to be keyed entirely the other way and to that extent constitutes an overdrawn indictment of the direct and indirect air carriers presently promoting the booming air freight business.

The majority places great stress on the ability of the truckers to bring the benefits of air freight to smaller off-line points. Yet no applicant proposes to so limit its operations. The fact of the matter is that there is presently a comprehensive system of surface transport linking virtually every hamlet with the nearest air terminal whether the service is by an airline or an air freight forwarder truck, a local cartage agent or an over-the-road line-haul truck service. Consequently, this is not a case in which the existing system is so devoid of available service that we must turn to the ranks of the very largest line-haul truckers, eventually the railroads *et al.*, to insure the availability of air service to so-called off-airline points.

The trucker applicants are not essential to the continued healthy growth and expansion of the air freight market. If granted authority they would become very powerful competitors operating in a framework of continuous conflicts as to their best corporate interests. The monitored entry procedure is to all intents and purposes free entry upon

recitation of the required incantation. These factors and the revised opinion do not, in my view, measure up to the standards imposed upon us by the Court in the remand. As I have indicated many times before, I am an ardent advocate of modernized coordination among the transport modes so that consumers may have the very best service. However, I fail to comprehend how intermodal coordination will be advantaged by this decision.

For these reasons of policy and procedure, I must dissent.

/s/ Robert T. Murphy

Appendix

DOCKET 16857

The Examiner's initial decision referred to herein is not attached to this copy because of the wide circulation given at the time of its release. The initial decision is attached to the original of the Board's Opinion and to the official copies in the Board's files and may be examined there. It will also be printed as part of the official "Civil Aeronautics Board Reports".

[Ed. note: The Examiner's initial decision appears *infra* at A-132]

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That operating authorizations to engage in air transportation as domestic and international air freight forwarders in accordance with the provisions of Parts 296 and 297 of the Economic Regulations of the Board be issued to CF Air Freight, Inc., and Navajo Freight Lines, Inc.;

2. That an operating authorization to engage in air transportation as a domestic air freight forwarder in accordance with the provisions of Part 296 of the Economic Regulations of the Board be issued to P.I.E. Air Freight Forwarding, Inc.;

3. That the control of P.I.E. Air Freight Forwarding, Inc., by Pacific Intermountain Express Co., and the interlocking relationships involved therein be and they hereby are approved;

4. That the control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., and the interlocking relationships involved therein be and they hereby are approved;

5. That control of CF Air Freight, Inc., by Consolidated Freightways, Inc., and the interlocking relationships involved therein be and they hereby are approved;

6. That (a) the operating authorizations of CF Air Freight, Inc., Navajo Freight Lines, Inc., and P.I.E. Air Freight Forwarding, Inc., and (b) the approval of the control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., shall terminate five years from the effective date of this order (subject to the provisions of subparagraphs 7(a) and 7(b) hereof);

7. That the authorizations and approvals granted herein shall be subject to the following conditions:

(a) The Board may revoke an authorization or approval, in whole or in part, if it finds after hearing that (i) the holder is no longer capable of performing the authorized air transportation or of conforming to the Act or the regulations thereunder; (ii) the holder is no longer willing to conscientiously promote air cargo and to benefit air transportation; or (iii) the holder's operations, alone or together with other similar carriers granted air freight forwarding authority, will create a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party thereto, or will otherwise be inconsistent with the public interest.

(b) If proceedings are instituted to revoke an authorization or approval under paragraph 7(a), the Board may suspend or limit such authorization or approval pending the outcome of the proceedings in accordance with the procedures specified by Sections 296.48 and 297.43 of the Board's Economic Regulations.

(c) CF Air Freight, Inc., Navajo Freight Lines, Inc., P.I.E. Air Freight Forwarding, Inc., and National Air Freight Forwarding Corporation shall file, in addition to the financial and statistical reports prescribed by Part 244 of the Board's Economic Regulations, the following schedules in the format attached to this order:

(i) The "Originating Air Station Data Schedule" reflecting the source of air freight tonnage enplaned and deplaned at originating air station (exclusive of reconsolidations) and data on the miles of surface movement of the air freight before and after its air transportation.

(ii) The "Supplemental Operating Statistics Schedule" reflecting the number and weight of those air freight shipments handled by both the air freight forwarder and the surface carrier who is its parent or affiliate or who operates as a separate division within the same corporate structure.

(iii) The "Analysis of Traffic by Weight Breaks" schedule reflecting, by specified weight breaks, the number and weight of shipments handled in air freight forwarding operations and the revenues received for the shipments.

(d) The persons named in paragraph 7(c) above shall also file with the Board, within 45 days after the close of each calendar year, a report showing as of December 31 of such year the location of each specialized air freight forwarding station and of each surface transport terminal at which air freight forwarding services are offered. The statement shall indicate, for each station or terminal, the number of drivers, salesmen, and other personnel who are assigned to promote air freight exclusively.

(e) Navajo Freight Lines, Inc., Pacific Intermountain Express Co., and Consolidated Freightways, Inc., shall file with the Board's Bureau of Accounts and Statistics, not later than 45

days after the end of each calendar quarter, the "Analysis of Traffic by Weight Breaks" schedule, in the format attached to this order, reflecting, by specified weight breaks, the number and weight of shipments handled in long-haul motor carrier operations and the revenues received for the shipments.

(f) In addition, the persons named in paragraph 7(e) above shall file the "Analysis of Traffic by Weight Breaks" schedule showing comparable data, to the extent available, for the corresponding quarter of each of the preceding five years.

8. That the approval of the control and interlocking relationships described in paragraphs 3, 4, and 5 above be and hereby are subject to the provisions of Part 251 of the Board's Economic Regulations now in effect and as hereafter amended;

9. That the application of D. C. International, Inc., and the application of T.I.M.E. Freight, Inc., for substitution as party-applicant and for other relief, be and hereby are dismissed without prejudice;

10. That the motions to consolidate filed by ILM Freight International, Inc., Roadway Express, Inc., Western Gillette, Inc., Wilson Air Freight Forwarding Systems, Inc., by Gateway Transportation Co., Inc., and Gateway Aviation Co., Inc., by Yellow Transit Freight Lines, Inc., *et al.*, and by Mercury Motor Express, Inc., be and hereby are denied; and that the petition of the first four named movants for leave to intervene be and hereby is denied;

11. That the motion of the Department of Transportation to file a statement of position be and hereby is granted; and that the Air Freight Forwarders Association's motion to strike the Department's pleading be and hereby is denied, but such pleading be and hereby is accepted as a reply thereto;

12. That the Board shall retain jurisdiction over this proceeding for the purpose of reviewing the approvals of the authorizations, common control, and interlocking relationships granted herein and/or of imposing at any time, with or without hearing, such other conditions as the Board may find just and reasonable; and

13. That this order shall become effective immediately.

By the Civil Aeronautics Board:

/s/ Harold R. Sanderson
Secretary

(SEAL)

Originating Air Station Data	Name of Carrier _____ Quarter Ended _____ ☐ Domestic ☐ Overseas/Foreign

Originating Air Station (1)	Tons Enplaned (exclusive of reconsolidations) (2)	Source of Tons Enplaned				Tons Deplaned (exclusive of reconsolidations) (7)	Distribution of Tons Deplaned			
		0-50 miles from airport (3)	51-150 miles from airport (4)	151-299 miles from airport (5)	300 or more miles from airport (6)		0-49 miles from airport (8)	50-149 miles from airport (9)	150-299 miles from airport (10)	300 or more miles from airport (11)

Attachment 1

ORIGINATING AIR STATION DATA

INSTRUCTIONS

(a) This schedule shall be filed by each air freight forwarder granted authorization by Board Order _____.

(b) This schedule shall be filed each quarter in duplicate and addressed to the Bureau of Accounts and Statistics, Civil Aeronautics Board, Washington, D. C. 20428. It shall be filed so as to be received by the Board within 45 days after the close of the prescribed reporting period.

(c) This schedule shall pertain only to the air freight forwarding operations of the reporting forwarder and not to its operations conducted as an agent of a shipper or as the commissioned agent of a direct air carrier.

(d) Definitions of "Originating Air Station", "Domestic" and "Overseas/Foreign" are found in § 244.1 of Part 244 of the Board's Economic Regulations.

(e) Report weights in short tons (2,000 pounds) computed to two decimal places.

(f) Where the reporting forwarder tenders both domestic and overseas/foreign freight, the forwarder shall file two separate reports listing the air stations for the domestic operations on one schedule and the air stations for the overseas/foreign operations on the other. Check either Domestic or Overseas/Foreign in the heading as applicable.

(g) The originating air stations from which the reporting forwarder conducts its air freight forwarding operations shall be listed in Column 1 and the indicated data reported in Columns 2 through 11. List them in alphabetical order until the volume of tons enplaned from

these originating air stations represent 100% of the reporting forwarders total tons enplaned domestically. The same limits and instructions would apply when filing the Overseas/ Foreign schedule.

(h) Column 2, "Tons Enplaned (exclusive of reconsolidations)" shall reflect the tons tendered to direct air carriers at each Originating Air Station. This will include tons delivered to the reporting forwarder by individual shippers, picked up by the reporting forwarder and picked up by surface carriers (including a surface affiliate or surface operation of the reporting forwarder). Tons being reconsolidated *should not* be included.

(i) Columns 3 through 6, "Source of Tons Enplaned" shall reflect the source, with regard to surface movement, of the tons enplaned reported in Column 2. Those tons delivered to the reporting forwarder, picked up by the reporting forwarder, and picked up by surface carriers (including a surface affiliate or surface operation of the reporting forwarder) from points within 49 miles of the airport shall be reported in Column 3. Those tons delivered to and picked up from points 50-149 miles, 150-299 miles and 300 miles or more from the airport shall be reported in Columns 4 through 6, respectively.

(j) Column 7, "Tons Deplaned (exclusive of reconsolidations)" shall reflect the tons deplaned by the reporting forwarder at each Originating Air Station. This will include tons picked up from the reporting forwarder by designated consignees, delivered by the reporting forwarder and delivered by surface carriers (including a surface affiliate or surface operation of the reporting forwarder). Tons being reconsolidated *should not* be included.

(k) Columns 8 through 11; "Distribution of Tons Deplaned" shall reflect the distribution, with regard to surface movement, of the tons deplaned reported in Column 7. Those tons picked up from the reporting forwarder,

delivered by the reporting forwarder, and delivered by surface carriers (including a surface affiliate or surface operation of the reporting forwarder) at points within 49 miles of the airport shall be reported in Column 8. Those tons picked up and delivered at points 50-149 miles, 150-299 miles and 300 or more miles from the airport shall be reported in Columns 9 through 11, respectively.

SUPPLEMENTAL OPERATING STATISTICS	Name of Carrier: _____ Quarter Ending: _____					
COMBINATION SURFACE/AIR OPERATIONS	Domestic		Overseas/Foreign		Total	
	Number	Weight (tons)	Number	Weight (tons)	Number	Weight (tons)
1. Forwarding shipments received from an associated surface carrier.						
2. Forwarding shipments delivered to an associated surface carrier.						
3. Shipments forwarded via substitute service, in lieu of air.						
OTHER AIR OPERATIONS						
4. Shipments as commissioned agent for direct air carrier.	XXXXX	XXXXX				
5. Shipments as agent for shipper by air.						

Attachment 2

SUPPLEMENTAL OPERATING STATISTICS

INSTRUCTIONS

(a) This schedule shall be filed by each air freight forwarder granted authorization by Board Order _____.

(b) This schedule shall be filed each quarter in duplicate and addressed to the Bureau of Accounts and Statistics, Civil Aeronautics Board, Washington, D. C. 20428. It shall be filed so as to be received by the Board within 45 days after the close of the prescribed reporting period.

(c) Definitions of "Domestic" and "Overseas/Foreign" are found in § 244.1 of Part 244 of the Board's Economic Regulations.

(d) Report weights in short tons (2,000 pounds), computed to two decimal places.

(e) *Item 1:* Report in the appropriate columns the number and weight of those shipments which the reporting forwarder received from an associated surface carrier (who is the forwarder's parent or affiliate or who operates as a separate division within the same corporate structure) prior to transporting them in its air freight forwarding operations.

(f) *Item 2:* Report in the appropriate columns the number and weight of those shipments which the reporting forwarder delivered to an associated surface carrier (who is the forwarder's parent or affiliate or who operates as a separate division within the same corporate structure) subsequent to transporting them in its air freight forwarding operations.

(g) *Item 3:* Report in the appropriate columns the number and weight of those shipments which the reporting forwarder accepted for air freight forwarding, but substituted means other than air for their transportation.

(h) *Items 4 and 5:* Report in the appropriate columns the number and weight of those shipments handled by the reporting forwarder in its agency capacity as applicable under § 296.3 and § 297.3 of Parts 296 and 297, respectively, of the Board's Economic Regulations.

Attachment 3

ANALYSIS OF TRAFFIC BY WEIGHT BREAKS

INSTRUCTIONS

(a) This schedule shall be filed by each air freight forwarder granted authorization by Board Order _____ and by the long-haul motor carrier who is its parent or affiliate or who operates as a separate division within the same corporate structure. The indicated data shall reflect air freight forwarding operations and long-haul motor carrier operations, respectively.

(b) Each long-haul motor carrier, in addition to reporting data for the current quarter, shall report comparable data, insofar as they are available, relative to its long-haul motor carrier operations for the corresponding quarter of each of the preceding five years.

(c) Check either "Air" or "Surface" as appropriate in the heading.

(d) This schedule shall be filed each quarter in duplicate and addressed to the Bureau of Accounts and Statistics, Civil Aeronautics Board, Washington, D. C. 20428. It shall be filed so as to be received by the Board within 45 days after the close of the prescribed reporting period.

(e) This schedule shall apply only to domestic operations and reflect in the specified weight breaks, the number and weight of shipments and the revenues received for the shipments.

(f) "Shipment" shall be defined as a single consignment of one or more pieces, from one shipper, at one time, at one address, receipted for in one lot, and moving on one airbill to one consignee at one destination address.

(g) Report weights in short tons (2000 pounds), computed to two decimal places.

(h) Column 2, "Shipments: Total Number" shall reflect, for the specified weight breaks in column 1, the total number of shipments received for air freight forwarding or long-haul shipping, as appropriate.

(i) Column 3, "Shipments: Percentage of Total" shall reflect the total number of shipments in each weight break divided by the total number of shipments in the specified weight breaks, in aggregate.

(j) Column 4, "Tonnage: Total Weight" shall reflect, for the specified weight breaks in column 1, the total weight in tons of the shipments reported in column 2.

(k) Column 5, "Tonnage: Percentage of Total" shall reflect the total weight of the shipments in each weight break divided by the total weight of the shipments in the specified weight breaks, in aggregate.

(l) Column 6, "Revenue: Total Dollars" shall reflect, for the specified weight breaks in column 1, the total revenue received for the shipments reported in column 2.

(m) Column 7, "Revenue: Percentage of Total" shall reflect the total revenue received for the shipments in each weight break divided by the total revenue received for the shipments in the specified weight breaks, in aggregate.

PSDR-22
EDR-159

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Policy Statements
Economic Regulations
Docket No. 20926
Dated: Apr 21, 1969

PART 399
STATEMENTS OF GENERAL POLICY

PART 296
CLASSIFICATION AND EXEMPTION OF
INDIRECT AIR CARRIERS

PART 297
CLASSIFICATION AND EXEMPTION OF INTER-
NATIONAL AIR FREIGHT FORWARDERS

PART 244
FILING OF REPORTS BY AIR FREIGHT FORWARDERS,
INTERNATIONAL AIR FREIGHT FORWARDERS,
AND COOPERATIVE SHIPPERS ASSOCIATIONS

PROCESSING OF APPLICATIONS BY LONG-HAUL MOTOR CARRIERS OF GENERAL COMMODITIES AS AIR FREIGHT FORWARDERS OR INTERNATIONAL AIR FREIGHT FORWARDERS

NOTICE OF PROPOSED RULE MAKING

Notice is hereby given that the Civil Aeronautics Board has under consideration proposed amendments to Parts 399, 296, 297, and 244 of the Board's Regulations (14 CFR Parts 399, 296, 297, 244) concerning the filing and processing of applications of long-haul motor carriers of general

commodities for authorization as air freight forwarders or international air freight forwarders and applications of long-haul motor carriers of general commodities for approval of control of an air freight forwarder or international air freight forwarder. The principal features of the proposed amendments are further described in the Explanatory Statement, and the proposed amendments are set forth in the Proposed Rule. This regulation is proposed under the authority of Sections 204(a), 101(3), 407 and 416 of the Federal Aviation Act of 1958, as amended, 72 Stat. 743, 49 U.S.C. 1324; 72 Stat. 737, 49 U.S.C. 1301; 72 Stat. 766, 49 U.S.C. 1377; 72 Stat. 771, 49 U.S.C. 1386. It interprets or applies sections 102 and 408, 72 Stat. 740, 49 U.S.C. 1302; 72 Stat. 767, as amended by 74 Stat. 901, 49 U.S.C. 1378.

Interested persons may participate in the proposed rule making through submission of twelve (12) copies of written data, views, or arguments pertaining thereto, addressed to the Docket Section, Civil Aeronautics Board, Washington, D. C. 20428. All relevant matter or communications received on or before May 23, 1969, will be considered by the Board before taking final action on the proposals. Copies of communications will be available for examination by interested persons in the Docket Section, Room 712 Universal Building, 1825 Connecticut Avenue, N. W., Washington, D. C., upon receipt thereof.

By the Civil Aeronautics Board:

/s/ Harold R. Sanderson
Secretary

(SEAL)

VICE CHAIRMAN MURPHY DISSENTING:

See my dissent attached to Order 69-4-100.

/s/ Robert T. Murphy

EXPLANATORY STATEMENT

In Order 69-4-100, dated April 21, 1969, issued concurrently herewith, the Board determined to authorize three long-haul motor carriers of general commodities or their subsidiaries to engage in air freight forwarding operations on an experimental basis for a temporary period. It also approved the resulting control and interlocking relationships. At the same time the Board announced that applications by other motor carriers to enter the forwarding field would be processed under regulations articulating a policy of monitored entry. The proposed regulations are intended to implement that policy.

In brief, these regulations provide that air freight forwarding authority may be granted to long-haul motor carriers of general commodities on an individual application basis, with or without hearing, upon a showing that (1) the applicant is capable of performing the proposed air transportation and of conforming to the Act and the regulations thereunder; (2) the applicant will conscientiously promote air cargo and will benefit air transportation; and (3) the applicant's operations, alone or together with those of other similar carriers granted air forwarding authority, will not result in creating a monopoly or monopolies and thereby restrain competition, or jeopardize another air carrier and will not otherwise be inconsistent with the public interest (Parts 399, 296 and 297). The regulations further provide for approval of applications of long-haul motor carriers of general commodities for control of air freight forwarders or international air freight forwarders, with or without a hearing, based upon similar criteria (Part 399). Finally, there will be new reporting requirements (Part 244) requiring motor carrier/air freight forwarders to disclose both their own and their surface affiliates' traffic in various classes of small shipments as well as other data which will indicate whether the applicants are stimulating new off-line business, increasing traffic from outside present terminal areas, and receiving new traffic from their surface divisions or affiliates.

Specifically, this new class of air carriers will be required to file three additional schedules: (1) an "Originating Air Station Data" schedule to reflect the source and distribution of tons enplaned and deplaned at the originating air station, and data on the miles of surface movement of the air freight before and after its air transportation; (2) a "Supplemental Operating Statistics" schedule to provide the number and weight of those intermodal air freight shipments handled by both the air freight forwarder and the surface carrier who is its parent or affiliate or who operates as a separate division within the same corporate structure; (3) an "Analysis of Traffic by Weight Breaks" schedule to indicate, by specified weight breaks, the number and weight of shipments handled in air freight forwarding operations and the revenues received therefor;[1] and (4) an annual report setting forth the location of each air freight forwarding station and each surface transport terminal at which air freight forwarding services are offered as well as certain personnel data relating to such stations and terminals.

Independent forwarders will also be required to file the "Originating Air Station Data" and the "Analysis of Traffic by Weight Breaks" so that the Board can evaluate the operations of independent and trucker-affiliated forwarders on a comparative basis.[2]

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[1] The related long-haul motor carrier will also be required to file an "Analysis of Traffic by Weight Breaks" schedule containing applicable data relative to its long-haul motor carrier operations, for both the current quarter and the corresponding quarter of each of the preceding five years.

[2] The Board recognizes that the new reporting requirements may prove burdensome to some of the independent forwarders, particularly the smaller carriers. While the Board can waive the requirements for individual carriers, it may be that the rule itself should not apply to the entire class of independent forwarders. Comments on this issue should contain specific data regarding the burdens involved in preparation of the reports and specific proposals for delineating the exempted class of carriers.

It is our intention to impose these requirements for a temporary period coterminous with the term of the operating authorizations issued in the *Motor Carrier-Air Freight Forwarder Investigation* (Docket 16857, Order 69-4-100) and for the duration of any proceeding in which a renewal of the authorization is sought.

PROPOSED RULES

It is proposed to amend Parts 399, 296, 297 and 244 of the Board's Regulations (14 CFR Parts 399, 296, 297, 244) as follows:

PART 399

1. Amend Part 399 by adding to the table of contents a new section at the end of Subpart B, reading as follows:

Sec.

399.21 Processing of applications of long-haul motor carriers for authority as air freight forwarders or international air freight forwarders.

2. Amend Part 399 by adding new § 399.21 to read as follows:

§ 399.21 *Processing of applications of long-haul motor carriers for authority as air freight forwarders or international air freight forwarders.*

(a) *General.* This Policy Statement prescribes the procedures and general standards which the Board will use in processing applications of long-haul motor carriers of general commodities for authorization as air freight forwarders or international air freight forwarders. It will also apply to such motor carriers' applications for Board approval of the acquisition of control of such forwarders.

(b) *Definition of long-haul motor carrier.* As used in this section, the term "long-haul motor carrier" means a motor carrier holding operating rights issued by the Interstate Commerce Commission to haul general commodities between any pair of points which are over 500 air miles apart, or an affiliate[1] of such a carrier.

(c) *Applications for forwarding authority.* Where a long-haul motor carrier applies for authority as an air freight forwarder or an international air freight forwarder and submits a proposal to conscientiously promote air cargo in conformity with Part 296 or 297, the following will be the Board's policy in ordinary circumstances:

(1) The Board will process the application without hearing.

(2) The Board will not deem the size, geographical extent, or general commodity rights of the long-haul motor carrier's surface transport authorization and operations, of themselves, as factors indicating that the applicant's operations as an air freight forwarder or international air freight forwarder will result in creating a monopoly or monopolies, and thereby restrain competition or jeopardize any air carrier, or will otherwise be inconsistent with the public interest.

(d) *Applications for acquisition of control.* Where a long-haul motor carrier applies for Board approval to acquire control of an air freight forwarder or an international air freight forwarder and submits a proposal to conscientiously promote air cargo, the Board's policy in ordinary circumstances will be as follows:

(1) The Board will process the application without a hearing if it determines (i)

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[1] For the definition of "affiliate" see § 296.1(e), *infra*, p. 9.

that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly and does not tend to restrain competition, and (ii) that no person disclosing a substantial interest then currently is requesting a hearing.

(2) The Board will not deem the size, geographical extent, or general commodity rights of the long-haul motor carrier's surface transport authorization and operations, of themselves, as factors indicating that the motor carrier's control of the air freight forwarder or international air freight forwarder will result in creating a monopoly or monopolies, and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control, or will otherwise be inconsistent with the public interest.

(e) *Exceptions.*

(1) If the Board finds that the long-haul motor carrier has not made a *prima facie* showing that it will conscientiously promote air cargo, the Board may (i) deny the application without hearing; or (ii) order a hearing.

(2) If the Board finds that the long-haul motor carrier has not made a *prima facie* showing that its operations (either alone or together with other similar carriers granted air forwarding authority) will not

result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier, or will not otherwise be inconsistent with the public interest, the Board may (i) deny an application without hearing; or (ii) order a hearing.

(3) The Board may also order a hearing if any person demonstrates that he will present evidence which may contradict the *prima facie* showing of a long-haul motor carrier described in this paragraph.

(f) *Priority in processing applications and deferral of applications.*

(1) Applications will not necessarily be scheduled for processing in the chronological order in which they are filed. In ordering its docket, the Board will give priority to those applications which appear best to effectuate the public interest, considering, among other things: (i) the number of similar applications previously processed and pending; (ii) the nature and extent of air freight forwarder services presently available at the cities in which applicant proposes to provide service; (iii) the nature of any objections filed; and (iv) the complexity of issues raised.

(2) The Board may defer action on any application or class of applications covered by this Policy Statement if it concludes that the public interest so requires.

PART 296

3. Amend the table of contents of Part 296 by adding Subpart I entitled as follows:

Subpart I—Authorization of Long-haul Motor Carriers of General Commodities as Air Freight Forwarders

Sec.

296.80 Applicability of subpart.
296.81 Applicability of other subparts.
296.82 Applicability of policy statement.
296.83 Application for operating authorization.
296.84 Notice.
296.85 Objections.
296.86 Criteria for authorization.
296.87 Conditions.
296.88 Duration.
296.89 Revocation or suspension.

4. Amend § 296.1 by adding paragraphs (d) and (e) to read as follows:

§296.1 *Definitions.*

For the purposes of this part:

* * * * *

(d) "Long-haul motor carrier" means a motor carrier holding operating rights issued by the Interstate Commerce Commission to haul general commodities between any pair of points which are over 500 air miles apart, or an affiliate of such a carrier.

(e) An "affiliate" of a long-haul motor carrier or an air freight forwarder means a person who controls such carrier or is controlled by such carrier or by another person who controls or is controlled by such carrier. A

person who owns, directly or indirectly, 20 percent or more of the outstanding issued capital stock of a carrier, in the absence of a proper showing to the Board that he does not control the carrier despite his stock ownership, shall be deemed to control the carrier for purposes of this part.

5. Amend Part 296 by adding Subpart I to read as follows:

Subpart I—Authorization of Long-haul Motor Carriers of General Commodities as Air Freight Forwarders

§ 296.80 *Applicability of subpart.*

This subpart sets forth the special rules applicable to the processing of applications of long-haul motor carriers, as defined in § 296.1(d), for authorization to operate in their own names as air freight forwarders. The regulation does not govern requests of motor carriers for Board approval of control relationships created when they apply through subsidiaries for authorization as air freight forwarders.

§ 296.81 *Applicability of other subparts.*

Unless otherwise provided in this subpart, the provisions of Subparts A through C and E through H of this part shall be applicable to the processing of applications of long-haul motor carriers for authority to operate as air freight forwarders, and to the conduct of such operations.

§ 296.82 *Applicability of policy statement.*

The provisions of § 399.21 of the Board's Policy Statements (14 CFR Part 399) shall be applicable to the processing of long-haul motor carriers for authority under this subpart.

§ 296.83 *Application for operating authorization.*

In addition to the requirements set forth in § 296.42, a long-haul motor carrier applicant must show:

(a) A plan to conscientiously promote air cargo. This showing shall include, *inter alia:*

(1) A statement as to whether the long-haul motor carrier plans to solicit existing surface customers for air cargo and, if so, the extent of such plans;

(2) A traffic estimate showing what traffic is newly-generated or presently shipped by surface means;

(3) An estimate of what portion of the long-haul motor carrier's existing surface traffic is subject to diversion to air;

(4) An estimate of beyond-terminal-area traffic moving by surface transportation over the routes of the long-haul motor carrier or via interline agreements; and

(5) A statement of the proposed air cargo sales force and facilities.

(b) A statement of the long-haul motor carrier's authority from the Interstate Commerce Commission or other regulatory agency, including a description of surface transportation authorized and offered at the stations at which air forwarding operations are proposed.

(c) A statement of any other advantages which would result from approval of the application.

§ 296.84 *Notice.*

Notice of applications will be published in the Federal Register and in the Board's weekly publication of applications filed.[1]

§ 296.85 *Objections.*

Within thirty (30) days after publication of notice of application in the Federal Register, any interested person may file an objection thereto. The objection must set forth an adequate factual showing of:

(a) the party's interest in the matter;

(b) his reasons for believing that the long-haul motor carrier or its affiliate will not promote air cargo; and

(c) any other reasons why the application does not meet the licensing criteria of § 296.86.

If a hearing is requested, the objection must set forth the economic data and other facts which the party will offer to prove.

§ 296.86 *Criteria for authorization.*

The Board will approve the application if it appears that:

(a) the applicant is capable of performing the proposed air transportation and of conforming to the provisions of the Act and all rules and requirements thereunder;

(b) the applicant will conscientiously promote air cargo and will benefit air transportation; and

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[1] Requests for the weekly publication should be addressed to the Publications Section, Civil Aeronautics Board, Washington, D. C. 20428.

(c) the applicant's operations, alone or together with those of other similar carriers granted air forwarding authority, will not create a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier, or otherwise be inconsistent with the public interest.[2]

§ 296.87 *Conditions.*

An authorization may be limited geographically or by classes of traffic. Additional conditions and restrictions may be imposed without hearing.

§ 296.88 *Duration.*

Unless sooner suspended or revoked, an authorization will continue in effect until is expires by its terms or until this subpart is terminated or revoked.

§ 296.89 *Revocation or suspension.*

The Board may institute proceedings to revoke the authorization of one or more long-haul motor carriers or a group of motor carriers if it has cause to believe that the continued operations of such carrier or carriers are contrary to the above-stated licensing criteria (§ 296.86). Pending completion of revocation proceedings, the Board may without hearing suspend or limit the authorization of such motor carrier or motor carriers in accordance with procedures specified by § 296.48.

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[2] Section 399.21 (Policy Statements) articulates decisional standards in this area (see, *supra*, p. 5, *et seq.*).

PART 297

6. Amend the table of contents of Part 297 by adding Subpart F to read as follows:

Subpart F—Authorization of Long-haul Motor Carriers of General Commodities as International Air Freight Forwarders

Sec.

297.60 Applicability of subpart.
297.61 Applicability of other subparts.
297.62 Applicability of policy statement.
297.63 Application for operating authorization.
297.64 Notice.
297.65 Objections.
297.66 Criteria for authorization.
297.67 Conditions.
297.68 Duration.
297.69 Revocation or suspension.

7. Amend § 297.1 by adding paragraphs (e) and (f) to read as follows:

§ 297.1 *Definitions.*

For the purposes of this part:

* * * * *

(e) "Long-haul motor carrier" means a motor carrier holding operating rights issued by the Interstate Commerce Commission to haul general commodities between any pair of points which are over 500 air miles apart, or an affiliate of such a carrier.

(f) An "affiliate" of a long-haul motor carrier or an air freight fowarder means a person who

controls such carrier or is controlled by such carrier or by another person who controls or is controlled by such carrier. A person who owns, directly or indirectly, 20 percent or more of the outstanding issued capital stock of a carrier, in the absence of a proper showing to the Board that he does not control the carrier despite his stock ownership, shall be deemed to control the carrier for purposes of this part.

8. Amend Part 297 by adding new Subpart F to read as follows:

Subpart F—Authorization of Long-haul Motor Carriers of General Commodities as International Air Freight Forwarders

§ 297.60 *Applicability of subpart.*

This subpart sets forth the special rules applicable to the processing of applications of long-haul motor carriers, as defined in § 297.1(e), for authorization to operate in their own names as international air freight forwarders. The regulation does not govern requests of motor carriers for Board approval of control relationships created when they apply through subsidiaries for authorization as international air freight forwarders.

§ 297.61 *Applicability of other subparts.*

Unless otherwise provided in this subpart, the provisions of Subparts A through E of this part shall be applicable to the processing of applications of long-haul motor carriers for authority to operate as international air freight forwarders and to the conduct of such operations.

§ 297.62 *Applicability of policy statement.*

The provisions of § 399.21 of the Board's Policy Statements (14 CFR Part 399) shall be applicable to the

processing of applications of long-haul motor carriers for authority under this subpart.

§ 297.63 *Application for operating authorization.*

In addition to the requirements set forth in § 297.32, a long-haul motor carrier applicant must show:

(a) A plan to conscientiously promote air cargo. This showing shall include, *inter alia:*

(1) a statement as to whether the long-haul motor carrier plans to solicit existing surface customers for air cargo and, if so, the extent of such plans;

(2) a traffic estimate showing what traffic is newly-generated or presently shipped by surface means;

(3) an estimate of what portion of the long-haul motor carrier's existing surface traffic is subject to diversion to air;

(4) an estimate of beyond-terminal-area traffic moving by surface transportation over the routes of the long-haul motor carrier or via interline agreements; and

(5) a statement of the proposed air cargo sales force and facilities

(b) A statement of the long-haul motor carrier's authority from the Interstate Commerce Commission or other regulatory agency, including a description of surface transportation authorized and offered at the stations at which air forwarding operations are proposed.

(c) A statement of any other advantages which would result from approval of the application.

§ 297.64 *Notice.*

Notice of applications will be published in the Federal Register and in the Board's weekly publication of applications filed.[3]

§ 297.65 *Objections.*

Within thirty (30) days after publication of notice of application in the Federal Register, any interested person may file an objection thereto. The objection must set forth an adequate factual showing of:

(a) the party's interest in the matter;

(b) his reasons for believing that the long-haul motor carrier or its affiliate will not promote air cargo; and

(c) any other reasons why the application does not meet the licensing criteria of § 297.66.

If a hearing is requested, the objection must set forth the economic data and other facts which the party will offer to prove.

§ 297.66 *Criteria for authorization.*

The Board will approve the application if it appears that:

(a) the applicant is capable of performing the proposed air transportation and of conforming to the provisions of the Act and all rules and requirements thereunder;

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[3] Requests for the weekly publication should be addressed to the Publications Section, Civil Aeronautics Board, Washington, D. C. 20428.

(b) the applicant will conscientiously promote air cargo and will benefit air transportation; and

(c) the applicant's operations, alone or together with those of other similar carriers granted air forwarding authority, will not create a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier, or otherwise be inconsistent with the public interest.[4]

§ 297.67 *Conditions.*

An authorization may be limited geographically or by classes of traffic. Additional conditions and restrictions may be imposed without hearing.

§ 297.68 *Duration.*

Unless sooner suspended or revoked, an authorization will continue in effect until it expires by its terms or until this subpart is terminated or revoked.

§ 297.69 *Revocation or suspension.*

The Board may institute proceedings to revoke the authorization of one or more long-haul motor carriers or a group of motor carriers if it has cause to believe that the continued operations of such carrier or carriers are contrary to the above-stated licensing criteria (§ 297.66). Pending completion of revocation proceedings, the Board may without hearing suspend or limit the authorization of such motor carrier or motor carriers in accordance with procedures specified by § 297.43.

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[4] Section 399.21 (Policy Statements) articulates decisional standards in this area (see, *supra*, p. 5, *et seq.*).

PART 244

9. Amend the table of contents of Part 244 by adding §§ 244.19a, 244.19b, 244.19c and 244.19d entitled as follows:

Sec.

* * * * *

244.19a Originating air station data (Schedule T-4).
244.19b Supplemental operating statistics—long-haul motor carriers/air freight forwarders (Schedule T-5).
244.19c Analysis of traffic by weight breaks (Schedule T-6).
244.19d Report of location of air freight forwarding stations and surface transport terminals.

10. Amend § 244.1 by defining the terms "affiliate" and "long-haul motor carrier" to read as follows:

§ 244.1 *Definitions.*

* * * * *

An "affiliate" of a long-haul motor carrier or an air freight forwarder means a person who controls such carrier or is controlled by such carrier or by another person who controls or is controlled by such carrier. A person who owns, directly or indirectly, 20 percent or more of the outstanding issued capital stock of a carrier, in the absence of a proper showing to the Board that he does not control the carrier despite his stock ownership, shall be deemed to control the carrier for purposes of this part.

"Long-haul motor carrier" means a motor carrier holding operating rights issued by the Interstate Commerce Commission to haul general commodities between any pair of points which are over 500 air miles apart, or an affiliate of such a carrier.

11. Amend § 244.10 by adding subdivision (4) to paragraph (b) and modifying paragraph (c) to read as follows:

§ 244.10 *General.*

* * * * *

(b) The aforesaid report consists of a statement of certification and individual schedules to be filed therewith at various specified times. These schedules are identified as follows:

* * * * *

(4) Schedule T-4, Originating Air Station Data; T-5, Supplemental Operating Statistics—Long-haul Motor Carriers/Air Freight Forwarders; T-6, Analysis of Traffic by Weight Breaks; all to be filed quarterly.

(c) The aforesaid schedules and certification shall be filed so as to be received by the Civil Aeronautics Board within forty-five (45) days after the termination of each prescribed quarterly, semi-annual and annual period and, with respect to Schedule I, also within thirty (30) days after a change relative to insurance data previously reported. All documents filed in connection with the report shall be considered a part thereof and included within the certification pertaining to the report. The reports shall be addressed to the Board, attention of the Bureau of Accounts and Statistics.

12. Add new §§ 244.19a, 244.19b, 244.19c and 244.19d to read as follows:

§ 244.19a *Originating air station data (Schedule T-4).*

(a) The schedule of originating air station data shall be filed by all air freight forwarders and international air freight forwarders. It is designated as Schedule T-4 of CAB Form 244, and shall be prepared for each calendar quarterly period and filed with the Board as provided in § 244.10.

(b) Schedule T-4 shall be filed separately with respect to domestic and overseas/foreign air operations. The schedule shall reflect the source and distribution of tons enplaned and deplaned (exclusive of reconsolidations) at the originating air station, and data on the miles of surface movement of the air freight before and after its air transportation. All the aforesaid categories shall be itemized and subdivided as shown by Schedule T-4 and the instructions thereon.

§ 244.19b *Supplemental operating statistics—long-haul motor carriers/air freight forwarders (Schedule T-5).*

(a) The schedule of supplemental operating statistics shall be filed by (1) long-haul motor carriers of general commodities which are authorized to operate as air freight forwarders or international air freight forwarders, and (2) air freight forwarders or international air freight forwarders which are affiliates of long-haul motor carriers. It is designated as Schedule T-5 of CAB Form 244, and shall be prepared for each calendar quarterly period and filed with the Board as provided in § 244.10.

(b) Schedule T-5 shall cover where applicable both domestic and overseas/foreign air operations.

With respect to combination surface/air operations of the forwarder, the schedule shall reflect the number and weight of (1) shipments which the reporting forwarder received from or delivered to an affiliated long-haul motor carrier prior or subsequent to transporting them in its air freight forwarding operations, and (2) shipments which the reporting carrier accepted for air freight forwarding, but substituted other than air means for their transportation. With respect to other air operations by the forwarder, the schedule shall reflect the number and weight of all shipments tendered by the reporting carrier to direct air carriers in a capacity other than as a freight forwarder (shipper's agent or agent for direct air carrier). All the aforesaid categories shall be itemized and subdivided as shown by Schedule T-5 and the instrutions thereon.

§ 244.19c *Analysis of traffic by weight breaks (Schedule T-6).*

(a) The schedule of analysis of traffic by weight breaks shall be filed by all air freight forwarders, international air freight forwarders and long-haul motor carriers affiliated therewith or operating as a separate division within the forwarder's corporate structure. It is designated as Schedule T-6 of CAB Form 244, and shall be prepared for each calendar quarterly period and filed with the Board as provided in § 244.10. In addition, each long-haul motor carrier shall report applicable data (insofar as they are available) relative to its long-haul motor carrier operations for the corresponding quarter of each of the preceding five years.

(b) Separate schedules shall be filed with respect to air operations and surface operations. The schedule

shall apply only to domestic operations and shall reflect, in the specified weight breaks, the number and weight of shipments and the revenues received therefor, as well as the percentage of the total represented by each weight break in the three main categories—number of shipments, tonnage of shipments and revenue derived from shipments. All the aforesaid categories shall be itemized and subdivided as shown by Schedule T-6 and the instructions thereon.

§ 244.19d *Report of location of air freight forwarding stations and surface transport terminals.*

Each long-haul motor carrier holding an authorization to operate as an air freight forwarder or international air freight forwarder and each air freight forwarder or international air freight forwarder which is an affiliate of a long-haul motor carrier shall file with the Board's Bureau of Accounts and Statistics, Washington, D. C. 20428, within 45 days after the close of each calendar year, a report showing as of December 31 of such year the location of each specialized air freight forwarding station and of each surface transport terminal at which air freight forwarding services are offered. The statement shall indicate, for each station or terminal, the number of drivers, salesmen and other personnel who are assigned to promote air freight exclusively.

[391 F.2d 295]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 281 – September Term, 1967.

(Argued January 4, 1968 Decided March 13, 1968.)

Docket No. 31795

ABC AIR FREIGHT COMPANY, INC.; ACME AIR CARGO, INC.; ADD AIRFREIGHT CORPORATION; AIRBORNE FREIGHT CORPORATION; AIR-LAND FREIGHT CONSOLIDATORS, INC.; AIR-SEA FORWARDERS, INC.; AIRWAYS AIRFREIGHT; AMERICAN EXPRESS COMPANY; BARNETT AIR CARGO, INC.; PETER A. BERNACKI, INC.; DOMESTIC AIR EXPRESS; EMERY AIR FREIGHT CORPORATION; HENSEL, BRUCKMANN & LORBACHER, INC.; INTERNATIONAL CUSTOMS SERVICE, INC.; H. G. OLLENDORFF, INC.; PACIFIC AIR FREIGHT, INC.; PANALPINA AIR FREIGHT, INC.; PENSON FORWARDING CORPORATION; WTC AIR FREIGHT; and AIR FREIGHT FORWARDERS ASSOCIATION,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

C. F. AIR FREIGHT, INC., CONSOLIDATED FREIGHTWAYS, INC., P I E AIR FREIGHT-FORWARDING, INC., PACIFIC INTERMOUNTAIN EXPRESS CO., D C INTERNATIONAL, INC.; and NAVAJO FREIGHT LINES, INC.,

Intervenors-Respondents.

Before:

LUMBARD, *Chief Judge*,
MOORE and FRIENDLY, *Circuit Judges*.

Petition by air freight forwarders and their association to review an order of the Civil Aeronautics Board granting applications of long-haul motor carriers to act as air freight forwarders, directly or through subsidiaries, and related brief. Order vacated and cause remanded for further findings.

LOUIS P. HAFFER, Washington, D. C. (Paul Berger, New York, N. Y.; Andrew P. Goldstein, Washington, D. C., of Counsel), *for Petitioners.*

RAYMOND J. RASENBERGER (Lear, Scoutt & Rasenberger, Washington, D. C.), *for Intervenors, D C International, Inc. and Navajo Freight Lines, Inc.*

EUGENE T. LIIPFERT (Verner, Liipfert & Bernhard, Washington, D. C.; James M. Verner on brief; Robert J. Sisk (Hughes, Hubbard, Blair & Reed, New York, N. Y.) on brief), *for Intervening Respondents, CF Air Freight, Inc., Consolidated Freightways, Inc., P.I.E. Air Freight Forwarding, Inc., and Pacific Intermountain Express Co.*

WARREN L. SHARFMAN, Associate General Counsel (Joseph B. Goldman, General Counsel, O. D. Ozment, Deputy General Counsel, Harry N. Stein, Donald F. Turner, Howard E. Shapiro, Attorneys, Department of Justice, Washington, D. C.), *for Respondent, Civil Aeronautics Board.*

FRIENDLY, *Circuit Judge*

Under §296.11 of the Civil Aeronautics Board's Economic Regulations, effective October 15, 1948, as amended, air freight forwarders are exempted from the certificate provisions of §401 of the Federal Aviation Act (other than subdivision (k)(3)), see §101(3), but must obtain letters of registration. While these are normally issued, under delegated power, by the Bureau of Operating Rights, 14 C.F.R. §385.13(d) (1967), without a hearing,[1] the Board's policy, as we shall later develop in some detail, had been to deny such letters to motor carriers or subsidiaries of motor carriers significantly competing with air carriers.

In January 1966 the Board began a proceeding known as the Motor Carrier-Air Freight Forwarder Investigation, noting that "The fundamental question posed is whether long-haul motor carriers of general commodities should be allowed to participate in air transportation, either in their own right or through the device of acquiring an air freight forwarder." Various applications for approval of acquisitions of air freight forwarders were consolidated.

These applications had somewhat altered their aspect by the time Examiner [297] Ruhlen rendered his initial decision. Two long-haul truckers, D. C. International, Inc. and Navajo Freight Lines, Inc., sought authority to act as air freight forwarders in their own right. Consolidated Freightways, Inc., the nation's largest long-distance trucker, which had initially sought approval of its acquisition of control of an existing domestic and international air freight forwarder, applied for a letter of registration for its wholly-owned subsidiary, CF Air Freight, Inc., and for the necessary ancillary approvals under §§408 and 409. Pacific

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[1] The Board will review decisions by the staff under such delegation only if two or more of its members believe this desirable. 14 C.F.R. §385.54(b) (1967).

Intermountain Express Company, which also had initially sought approval only of its acquisition of control of an international air freight forwarder, applied both for this and for letters of registration for its subsidiary, P.I.E. Air Freight Forwarding, Inc., and related relief. The applications were opposed by eight scheduled airlines including the six largest domestic operators, by all-cargo air carriers, and by air freight forwarders and their association, most of whom have joined in the instant petition for review. They were opposed also by the Board's Bureau of Operating Rights.

The Examiner rendered an Initial Decision in April 1967. He began by saying that:

> "The immediate issue is whether the four applicants should be authorized to operate as air freight forwarders, but the Board, in instituting this proceeding, stated that the fundamental question is whether long-haul motor carriers of general commodities should be allowed to act as air freight forwarders."

He considered that the issue must be resolved against the background of "free entry" into air freight forwarding which he regarded as established in the Air Freight Forwarder Case, 9 C.A.B. 473 (1948). Reviewing various contentions of the applicants as to what their position as motor carriers would enable them to contribute to air transportation, he found these claims of special advantages were not made out, save only that "use of the sophisticated accounting, billing, and reporting systems which only a large organization can afford should assist the applicants in providing a convenient service to the public." Nevertheless he concluded that "the applicants, by providing sophisticated management, personnel, and equipment and devoting their well-financed experienced organization to the generation and transportation of cargo by air, will contribute a substantial benefit to the public." Turning

to the effect on existing air freight forwarders, he thought "the strong and efficient forwarders will suffer only minor losses with the entry of the applicants into competition," although "the demise of some of the weaker air freight forwarders may be hastened by the competition provided by the applicants." Believing that "If the applicants are to be successful, they will have to rely on newly generated traffic," the Examiner dismissed the arguments based on their conflict of interest primarily on the basis that "although in some circumstances for short periods of time an energetic and clever promoter may be able to persuade shippers to use modes of transportation adverse to their economic interests, in the long run, the shipper will choose that form of transportation which best meets his needs." Finally, following a previous Board ruling that the second provisio to §408(b)[2] was inapplicable to "indirect air carriers," Air Freight Forwarder Case, *supra*, 9 C.A.B. at 503, reaffirmed in Airfreight Forwarder Investigation, 21 C.A.B. 536, 544-45 (1955), he held there was [298] no legal barrier to the applications, and proposed that all should be granted for an experimental period of five years.

The Board, over a dissent by Vice Chairman Murphy, followed the Examiner's recommendations except in a minor respect not here material.[3] However, the Board

[2] "*Provided further*, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purpose of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: . . . ."

[3] This related to D. C. International, Inc., which has come under the control of National City Lines, Inc., a motor carrier holding company. The Board deferred issuance of D. C. International's letter of registration until an application by National for its control could be passed upon.

exhibited markedly greater enthusiasm over the new departure than had the Examiner. Apparently dissatisfied with the Examiner's theory that the conflict of interest arising from authorizing long distance truckers to act as air freight forwarders should be disregarded because it would not be effective in the long run, the Board decided that the double role would lessen conflict rather than increase it. Whereas the Examiner seemed to have thought that generation of new air freight by the truckers would be only of the same sort that any vigorous sales effort would engender, the Board found a particularized source in the "large proportion of the truckers' present surface traffic . . . comprised of shipments weighing less than 200 pounds," which they now transport "at a loss or minimal gain," and whence they "could earn more as forwarders by shipping such packages by air." It concluded also that authorizing the truckers to act as air freight forwarders "should increase the intermodal carriage of freight by air and truck"; indeed, it regarded its decision "as a real breakthrough in opening up the most hopeful avenue for increasing intermodal transportation of freight by surface and air." It thought also that "The participation . . . of motor carriers like the applicants may well be necessary to achieve the full promise of air cargo," emphasizing especially the role they could play in areas outside the ten cities in which the traffic is most developed. For these reasons, as well as those urged by the Examiner, it was "convinced that a new policy towards motor carriers like the applicants deserves a trial."

I.

The Board's decision does not measure up to the standards required by §8(b) of the APA, as recently applied in *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579 (1 Cir. 1964),

see especially Judge Aldrich's concurring opinion, 331 F.2d at 589. The most serious deficiency lies in the ambiguity whether the Board has established a policy of entry for all truckers who want to act as air freight forwarders or has merely granted the four applications that were before it, and the inadequacy of its consideration of effect on the existing forwarders if the former is the right interpretation as we strongly suspect.

Certainly the Examiner thought, as instanced by our first quotation, that the decision would have general applicability. That also would be the natural inference from such statements by the Board as that "Our purpose in instituting this investigation was to determine whether our traditional restrictions on surface carriers have become outmoded for motor carriers like the applicants," that it regarded its decision "as a real breakthrough" in stimulating intermodal transportation, and that it was establishing "a new policy towards motor carriers like the applicants." Indeed, the Board's brief in this court concedes that "its findings and pronouncements also were such as to indicate that it may be expected to grant future applications by other long-haul motor carriers to engage in air freight forwarding activities" – which, as indicated, is normally done by its staff and without a hearing.

On the other hand, the agency almost completely failed to examine the effect that entry of large numbers of motor carriers will have upon the structure of the air freight forwarding industry. The Board's opinion does not really consider this question at all – its finding that "motor carriers like the applicants" [299] would stimulate the development of air cargo is based entirely upon a review of the operational plans submitted by the four carriers in the instant proceeding and no attempt is made to assess the effect of a general motor carrier invasion. The Examiner's analysis

is only slightly less scanty. At one point the possibility of adverse effect upon the industry is discounted on the ground that "the independent freight forwarders" are in an "impregnable" competitive position at the present time. But to evidence this conclusion, the Examiner pointed only to the increasing profitability of the top ten forwarders. As we have already noted, other parts of his opinion recognize that "the demise of some of the weaker air freight forwarders may be hastened by the competition provided by the applicants.". If "some" of the existing forwarders will succumb to the challenge of these four motor carriers, the impact of a general policy admitting all long-haul truckers will be much more severe, and the danger is enhanced by the probability, hereafter developed, that the truckers would bend their efforts primarily to forwarding freight now moving by air rather than to diverting freight now moving by truck.

The record shows that the air freight forwarding industry is now very much divided between the haves and have-nots. Of the 120 forwarders the ten largest accounted for 72.8% of total revenue and earned 7.2 million dollars in pre-tax profits in 1965; the remaining 110 suffered a net operating deficit of 1.1 million dollars. Seventy percent of the domestic forwarders earned less than $25,000 in 1964; one-third operated at a loss. Indeed, even the aggregate figure representing the profitability of the "impregnable" top ten is quite deceiving — of the 7.2 million dollars earned by these forwarders, 5.2 was garnered by Emery Air Freight, which has consistently captured 30% of the market. Taken as a whole the industry would thus seem highly vulnerable to the effect of entry by many well-financed competitors.

As to the number of truckers that might take advantage of the Board's new policy, the Bureau of Operating Rights presented figures that reveal the dimension of the problem:

Numbers of Carriers in 1964 Compared by Revenue Characteristics (Exhibit BOR-8)

	$1,000,000 or More Gross Revenue	$200,000 to 1,000,000	Under 200,000	Total
ICC Licensed Motor Carriers	1,195	2,536	11,748	15,479
CAB Authorized Air Freight Forwarders	17	32	56	105

The dangers seem even greater than this chart reveals. There are 50 truckers with gross revenue exceeding $25,000,000 and 20 with gross revenue of some $40,000,000 or more – a level attained in air freight forwarding only by Emery Air Freight, with 30% of the market, even when Emery's thriving international forwarding operations are included. Indeed, three of the four instant applicants have revenues larger than even Emery – Consolidated Freightways being three times as large. Only three other air freight forwarders who are members of the forwarders' association, one of them predominantly international, have gross [300] revenues of $10,000,000 or more, as against over a hundred truckers with revenues exceeding that amount. In this context, the Examiner's confidence in the ability of even the stronger independent forwarders to withstand a massive invasion of motor carriers is without substantial evidentiary support.[4]

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[4] While the Examiner's confident assessment was based in part upon the testimony of the nineteen shippers the applicants called as witnesses, their inconclusive testimony is far from indicating that the truckers will not divert substantial quantities of cargo from the independents, even the stronger ones. Although all the shippers said they would use the services provided by one or more of the applicants, five denied that their use of air freight would increase as a result, while only four testified with any clarity that they would ship more by air domestically if the applications were approved. The remaining ten were ambiguous.

The record affords no indication that the agency made any informed determination of the number of motor carriers that would seek to take advantage of its new policy. While the fact that only four have applied could indicate that the others lack interest, this seems more likely to have represented simply a tactical determination that it was best for a small number to try to open the gate. Indeed, competitive reasons might force other motor carriers to follow the leaders whether or not they would otherwise have wished. The Bureau of Operating Rights seemed to suggest this when it said in commenting on the chart we have reproduced: "If, for competitive reasons, all of the motor carriers in the over $1,000,000 revenue category apply for and are granted air freight forwarder authority, the size of the air freight forwarder industry would increase by more than 10 fold."[5] It is as obvious as anything can be that the effect on the existing air freight forwarders will be very different if the permission here accorded is utilized by all long-haul motor carriers, almost all, many, or only four. And, as the Board properly recognized, the continued health of the independent forwarders is of utmost importance not only to themselves but to the future of air freight. Indeed, the argument that motor carrier applicants were not disqualified by their conflicting interests rested in part on the continued ability of the independents to prevent them from fooling all of the people all of the time.

Perhaps concerned by realization that the breadth of the Board's policy pronouncement and the meagreness of its findings as to competitive effect were not in mesh, counsel

[5] We realize that the Board's new policy is stated to be "experimental" and the "experiment" is limited to five years. But experience with other time limitations in certificates and exemptions suggests the fatuousness of believing that an authorization widely availed of by the motor carrier industry could be feasibly brought to an end.

for the Board, in a footnote to their brief, accused petitioners of having "distorted the Board's opinion" by indicating "that only casual *pro forma* consideration would be given to further applications of 'all members of' an 'entire class' . . . ." We find no distortion; indeed, as already indicated, we would so read the opinion and Board counsel themselves said as much in the earlier passage we have quoted from their brief. Of course, it may be that the footnote is right and the earlier passage wrong; if entry of motor carriers into air freight forwarding is indeed to be an experiment, it would seem much more sensible to limit the number unless – another point on which the decisions shed no light – this would create unfair dislocations within the motor carrier industry. But the case in this aspect comes precisely within Mr. Justice Cardozo's much-quoted observation, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, M. St. P. & P. R.R.*, 294 U.S. 499, 511 (1935); see also *Secretary of Agriculture v. United States*, 347 U.S. 645, 654 (1954). **[301]**

This failure of analysis of the effect of general entry by motor carriers cannot be excused on the basis of the Board's twenty-year commitment to a policy of "free entry" into freight forwarding in contrast with the contrary view arrived at by the Interstate Commerce Commission and adopted by Congress as to surface forwarding. See 71 Stat. 452 (1957), and 2 U.S. Code Cong. & Adm. News, 85th Cong., 1st Sess. 1640-45 (1957). Free entry by persons willing to risk new capital in air freight forwarding as a prime occupation is one thing; entry as a sideline to much larger investments in other business is something else again. This consideration is peculiarly important when the other business is surface transportation – another point of difficulty to which we now turn.

II.

Until the decision here under review, the Board has granted surface carriers air forwarding authority only after study of the particularized situation convinced it that the carrier's conflict of interest would not "result in material diversion of traffic from air to surface transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding." Air Freight Forwarder Authority Case, Order E-21056, July 10, 1964 (mimeo, page 4). In the first Air Freight Forwarder Case, *supra*, 9 C.A.B. at 507-08, the Board granted authority to three Class I motor carrier affiliates but only on a showing that the motor carrier operations were so limited as not to be truly competitive with air transportation; it denied authority to a subsidiary of a railroad on the grounds that this "would create a serious handicap to independent air freight forwarders" and that the conflict of interest "might prove detrimental to the full development of the air services."[6] In its second domestic Airfreight Forwarder Investigation,

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[6] In *Air Freight Forwarder* Case (International), 11 C.A.B. 182 (1949), the Board granted international authority to certain forwarders affiliated with domestic surface carriers, but the competitive situation was recognized to be quite different. *Id.* at 197. Even there, however, the Board refused Railway Express Agency permission when it found that REA would dominate this branch of this industry:

> "Section 408 reflects the established general policy that our air transportation system shall be free of control by surface carriers. This fundamental concept cannot be ignored. There is no showing of inability on the part of existing international airfreight forwarders – independent of surface

(cont'd)

21 C.A.B. 536, 546 (1955), the Board granted experimental authority to two forwarders controlled by railroads, but once again the decision was made only after the applicants' particular proposals were studied, and no indication was given that subsequent applications would not be subjected to similar scrutiny. Finally, in 1964, the Board granted motor carriers permission to forward household goods only after finding that very little of this merchandise was then being shipped by air and that carriers of household goods did not have substantial investments in long-haul equipment competitive with air transit.[7] Compare Telstar Air Freight, Inc., Order E-22429 (issued under delegated authority) (1965). What was done here was not a modest expansion of these exceptions but a total reversal of policy. [302]

We fully agree that, as Mr. Justice Fortas recently so well expressed it, an administrative agency, "faced with new developments or in light of reconsideration of the

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(Footnote 6 continued)

> transportation – to provide the public with adequate service in this field. Rigid limitation of other forms of transportation in the Nation's air transportation system is in accord with congressional intent and is necessary for a soundly developed system."
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> Railway Express Agency – Airfreight Forwarder Application, 27 C.A.B. 500, 502 (1958).

See also the special conditions placed upon American Express' entrance into international freight forwarding. *American Express Company*, 31 C.A.B. 118 (1960).

[7] In 1963, the Board refused to review the decision of its Hearing Examiner granting an affiliate of United Parcel Service, a motor carrier, the right to engage in domestic forwarding. Order E-7324. But this is not claimed to have constituted adoption of a free entry policy towards motor carriers, and subsequent Board decisions have not accorded the decision any great precedential value.

relevant facts and its mandate may alter its past interpretation and overturn past administrative rulings and practice . . . . [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'ns v. Atchison, Topeka & S. Fe. RR*, 387 U.S. 397, 416 (1967). But we also concur with the First Circuit that a reversal of agency policy calls for thorough analysis and explication, *City of Lawrence v. CAB*, 343 F.2d 589 (1965), such as was performed by the Interstate Commerce Commission in the case eliciting the remarks of the Supreme Court we have quoted.

This is particularly necessary when the previous policy is not wholly agency determined but is a radiation from a direction of Congress. We need not quarrel with the Board's previously cited decision, sustained by the Seventh Circuit, *American Airlines, Inc. v. CAB*, 178 F.2d 903, 909-10 (1949), that the second proviso to §408(b), see fn. 2, does not apply in terms to an "indirect air carrier" since such a carrier could never avail itself of the statutory escape hatch, namely, demonstrating that it can "use aircraft to public advantage in its operation." Nevertheless, as was held by another court of appeals reviewing the same decision, in an opinion curiously not called to our attention, *National Air Freight Forwarding Corp. v. CAB*, 197 F.2d 384 (D. C. Cir. 1952), the Board is nevertheless obliged to consider the policies behind the proviso in regulating entry into forwarding. Congressional efforts to prevent participants in one form of transportation from limiting the development of competing forms have a fifty-five year history, going back to the Panama Canal Act of 1912, 49 U.S.C. §5(14)-(16), see Lake Line Applications Under Panama Canal Act, 33 ICC 699, 710-14 (1915). As to the importance of this policy in air regulation, we need only refer to the various opinions in American President Lines, Ltd., Petition, 7 C.A.B. 799 (1947), where, after thorough

reexamination, a majority of the Board concluded that although the second proviso to §408(b) did not in terms apply to an application by a surface carrier for a certificate under §401, respect for the policy determination of Congress required that unless such a carrier could meet the qualification of the second proviso as to using aircraft in its operation, it must show "that disadvantages existing upon the facts of the particular case by reason of its being a surface carrier were avoided or overcome by other considerations of public interest supported by the record." 7 C.A.B. at 807.[8] Later decisions of the Supreme Court in the motor carrier field show that the effect of the second proviso is at least that great. See *American Trucking Ass'ns v. United States*, 355 U.S. 141 (1957); *American Trucking Ass'ns v. Frisco Transportation Co.*, 358 U.S. 133, 141 (1958); *American Trucking Ass'ns v. United States*, 364 U.S. 1 (1960).

We find no force in the contention of Board counsel that questions of conflict in interest in air freight forwarding were ruled out by a clause in §410(c) of Title IV added to the Interstate Commerce Act by the Freight Forwarder Act of 1942, 52 Stat. 300, which we quote in [303] the margin.[9] Apart from the fact that the clause prohibits the issuance of forwarder permits to carriers themselves, as the Board here proposes to do for D. C. International and Navajo, since "this would create difficulties of administration and possible discriminatory practices," 87 Cong. Rec. 8427 (1942) (remarks of Representative Wolverton),[10]

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[8] Chairman Landis was unwilling to go so far, 7 C.A.B. 808, but Member Branch thought the majority had not gone far enough, 7 C.A.B. 821.

[9] "No such permit [to act as a freight forwarder with respect to traffic subject to the Interstate Commerce Act] shall be issued to any common carrier subject to chapters 1, 8, or 12 of this title; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to said chapters shall be denied because of the relationship between such corporation and such common carrier."

[10] For an explanation of the importance of Rep. Wolverton's construction of the Act, see *Chicago, M., St. P. & P. R.R. v. Acme Fast Freight*, 336 U.S. 465, 473-76 (1949).

the policies behind the 1942 proviso do not apply to the situation before us. Congress believed that since independent forwarders could consolidate shipments, thereby gaining a profit, it was "fundamentally unfair to deny to a common carrier that has invested its money in transportation facilities the right to use those facilities upon as favorable a basis as any forwarder can use them." *Id.* So far as air forwarding is concerned, it would be the airlines, not other common carriers, that could make a similar complaint. A second reason for this provision, also inapplicable here, was that certain railroads had already acquired forwarders whereas others had not and it was desired to avoid discrimination. See U.S. Code & Adm. News, 85th Cong., 1st Sess. 1641 (1957); 88 Cong. Rec. 8427 (1942) (remarks of Representative Wolverton). Since Congress was careful to make clear that "the Interstate Commerce Commission shall not have jurisdiction of, and part IV shall not apply to, freight forwarding by the use of air facilities, utilized in connection with air transportation . . .," H. Rep. No. 1172, *supra*, at p. 7 (1941), the proviso to §410(c) of the Interstate Commerce Act is of no importance when the concerns that motivated its enactment are found to be irrelevant.[11] See also *Pan American World Airways, Inc. v. CAB*, 382 F.2d 770, 782 (2 Cir. 1967), cert. granted, ___ U.S. ___ (1968).

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[11] We likewise find unpersuasive petitioners' argument that §1003 of the Federal Aviation Act, added as a part of the Freight Forwarder Act of 1942, which permits a motor carrier and an airline to establish a joint rate for through air-surface service but prohibits a motor carrier from entering into similar agreements with air forwarders, evidences a Congressional intention to foster coordination between surface and air carriers only through the joint rate mechanism and to bar the direct entrance of surface carriers into air forwarding. A prime purpose of the Freight Forwarder Act was to eliminate abuses that had arisen as a result of joint rate agreements between surface carriers and forwarders. The legislative history indicates that the amendment to §1003 had a similar purpose, H. Rep. No. 1172, 77th Cong., 1st Sess., p. 21 (1941).

We recognize that there is a substantial difference between allowing a surface carrier to control or become one of the limited number of certificated air carriers and to enter the field of air freight forwarding where a larger number of competing operators can thrive. Nevertheless, the Board must make adequately supported findings either that the suspected conflict of interest does not exist or that important public advantages justify disregarding it. The difficulty in making the former finding here would seem rather formidable in view of the Examiner's conclusion, accepted by all concerned, that "the rate of growth of air-cargo transportation will depend substantially upon the extent to which it is scientifically promoted . . ." and that the "largest potential source of air cargo" will only be developed as a result of "in-depth analysis of a shipper's operating problems" – this to include "determining the comparative cost of warehousing, damage claims, communications, storage, use of money, size of inventories, packing costs, and many other factors." [304] It is thus of little consequence that a motor carrier will readily forward shipments by air when the shipper requests this. The problem arises when the shipper is not already convinced of the merits of air freight, and we find a certain unreality in the spectacle of a long-haul motor carrier urging a shipper that higher air rates are counterbalanced by lower expense for warehousing, damage and pilferage, smaller packing costs, and inventory savings, when he knows that such arguments may spread from shipments he is willing to see go by air to others he decidedly is not. Yet, as the Examiner recognized, the forwarder is a kind of transportation adviser, see Comment, Intermodal Transportation and the Freight Forwarder, 76 Yale L.J. 1360, 1361-62 (1967), and his services are generally used by the smaller unsophisticated shipper. See Snow, Air Freight Forwarding: A. Legal and Economic Analysis, 32 J. of Air Law & Com. 485, 489-92 and table 4 (1966). To argue, as the Examiner did, that because the motor carriers cannot prevent certain shipments from moving by air,

they will try to promote their competitors' service in marginal cases seems at war with common sense. His alternative argument, that the motor carriers would be forced to promote air shipment by the efforts of the independent forwarders, presupposes continuing vigor of the independent forwarders and, apart from other objections, the lack of evidentiary support for this premise in the context of a large-scale invasion by motor carriers causes the conclusion to fall with it.

The Board sought to strengthen the case by proffering two additional considerations. In something of a *tour de force*, it argued that granting air freight forwarding authority to competing motor carriers not merely would present no real problem of conflicting interest but "will in fact reduce whatever conflict of interest may exist." This was because "if there be a conflict of interest, it inheres in the circumstances where the trucker may have a choice with respect to any shipment between transporting it all the way himself or turning it over to air carriers for part of the journey." If truckers have an economic incentive to ship by air in these situations, the Board concluded, their "conflicting" interest in the surface long haul will thereby be diminished. This betrays a serious confusion of thought. The interest of a trucker, so long as he sticks to trucking, is to truck to the utmost, save for shipments he will carry at a loss; he can have no conflict of interest even though he may cast a longing eye on other pastures. Conflict of interest arises only when an operator is permitted to engage in competing modes of transportation, with the inevitable consequence that his superior economic stake in one may conflict with his using the other in the best interests of the customer. If a trucker advises a shipper that air freight is uneconomic, even a naive businessman would recognize this to be special pleading. It is only when the trucker becomes an air freight forwarder, ostensibly also interested in air transport, that he is cast in a role creating danger of his being able to effect unfair preservation of a

status in which surface carriage is the norm. While the Board might conclude, after studying the proposals of a particular surface carrier, that despite its conflict of interest the applicant will conscientiously promote air transport, it cannot simply wish the conflict out of existence for a whole industry as it has done here.

Perhaps it was some awareness of this fallacy in its general position as to conflict of interest that led the Board to mark out a category of traffic, to wit, packages of less than 200 pounds, where no conflict was thought to exist since the truckers now carry these at a loss or minimal gain and they could earn more as forwarders by shipping such packages by air. However, the point outruns the evidentiary basis for it. The sole exhibit on which this conclusion rested had been presented by the Board's Bureau of Operating Rights with the caveat that its purpose was "not to attempt to fix the cost of handling shipments in relation to the revenue yields associated with spe-[**305**]cific commodities," but simply to suggest "that different weights and different commodities may have a significantly different impact upon motor carrier costs and revenues." To that end the Bureau took shipments of metal products, machinery and chemicals, with weight breaks at 100, 200 and 500 pounds, and compared transcontinental motor carrier average costs with Consolidated Freightways' revenue yield for sample shipments over similar mileages. The figures indicated a loss for metal products and chemicals in all three weight-breaks and for machinery below 200 pounds. Some things the figures do not tell are how far transcontinental average costs are appropriate for Consolidated Freightways, whether incremental costs would not be more significant for the use to which the Board put the exhibit, how far the figures for these three categories of traffic are representative, to what degree truckers would prefer to carry the smaller packages at a loss in order to prevent the shipper's becoming accustomed to air freight,

and how far the value of these shipments as compared with their weight and bulk would make them candidates for air freight forwarding so that the truckers might earn more by sending them that way. Not only is the exhibit inadequate on its face for the purpose for which it was used,[12] but other exhibits submitted by the Bureau squarely contradict the notion that motor carriers would gladly divert a large number of small shipments to the airlines. An I.C.C. study of a representative group of long-haul motor carriers, *including all four applicants, found that 45%* of the shipments transported by the truckers weighed less than 150 pounds. From this exhibit and others, the Bureau concluded that "motor carriers move the same commodities in small weight break categories as the air carriers. These commodities provide a primary source of weight and revenue for the direct air carriers, the air freight forwarders and the motor carriers." It is exceedingly dangerous business – indeed, under some circumstances a denial of the fair hearing required by the APA – for an agency to seize upon a single exhibit in a large record, introduced for a limited and hardly controversial purpose, and make this an important basis for decision without benefit of cross-examination, rebuttal or argument. Compare *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 304-06 (1937).

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[12] In its brief the Board claims that the Examiner took notice of studies undertaken by the Bureau of Accounts of the Interstate Commerce Commission which allegedly fully document the Board's conclusion, in a manner not detailed for our examination. Though certain of the figures in the exhibit upon which the Board relied are derived from these reports, there is no indication in the opinion that the Board based its conclusion on any other part of these studies. Moreover, the Examiner concluded that "motor carriers would, no doubt, prefer to carry *all* cargo by surface means" (emphasis supplied), and we are left to conjecture how these figures reconcile with the I.C.C. study noted in the next sentence of the text.

III.

The Board's failure to come to terms with the conflict of interest problem also undermines its findings that important public advantages will result from motor carrier entry into air freight forwarding. The agency emphasized that the truckers can be expected to develop air cargo in markets in which this service is presently being underutilized; this was of particular importance with respect to the further conclusion that the authorization would greatly increase intermodal carriage since that consideration faced an initial obstacle in the Examiner's uncontradicted finding that "most of the air cargo travels between major airline points . . . ." But it is precisely in these anticipated new markets, where there is at present little independent forwarder competition, in which the conflict of interest argument tells most strongly. Large numbers of independent forwarders have been entering the industry in recent years – the number of forwarders increased by 54% between 1961 and 1965 [**306**] and on December 31, 1965, sixty more forwarders had 98 applications for domestic and international authority pending. If a large number of truckers entered the underdeveloped markets at the present time and proceeded to follow their economic interests by skimming the cream, prospective independents might hesitate long before deciding to enter, cf. *F. T. C. v. Procter & Gamble Co.*, 386 U.S. 568, 579 (1967); Bain, Industrial Organization 239-40 (1959). Here again, the Board did not consider this problem in industry-wide terms, but simply based its conclusion on the applications of the four truckers in the present proceeding.

The Board also concluded that the grant of forwarding authority will induce the motor carriers to develop air cargo traffic beyond the traditional radius of 25 miles or within the city limits, 14 C.F.R. §222.21 (1967), 49 C.F.R. §210.40 (1967), to which the other air freight forwarders have been restricted. In

its opinion, however, the Board promised to consider expanding these limits in accordance with recent judicial decisions, *Law Motor Freight, Inc. v. CAB*, 364 F.2d 139 (1 Cir. 1966); *National Motor Freight Traffic Ass'n, Inc. v. CAB*, 374 F.2d 266 (D. C. Cir. 1966), cert. denied in both cases, 387 U.S. 905 (1967),[13] and petitioners argue that the agency's previous failure to take this step cannot provide it with a reason for permitting the truckers to enter the industry. To some extent this argument neglects that the Interstate Commerce Commission must also approve of such an expansion of service, see 49 U.S.C. §303 (b)(7a) (1964), *Air Dispatch, Inc. v. United States*, 237 F. Supp. 450 (E.D. Pa. 1964), aff'd, *per curiam*, 381 U.S. 412 (1965). While that agency's approach has been criticized as unduly restrictive, Note, Regulation of Air Freight Pickup and Delivery, 76 Yale L.J. 405 (1966), it nevertheless has declared that it would not be bound by the CAB's decision, although giving weight to this. *Motor Transportation of Property Incidental to Air*, 95 M.C.C. 71, 87 (1964), aff'd, *sub nom., Air Dispatch, Inc. v. United States*,

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[13] Petitioners tell us that the Board has already moved forward by expanding the Newark/New York terminal area to points ranging almost 60 miles from Newark and the Boston terminal area to 38 points in Rhode Island. Orders E-25797, 25798, and 25813. They also argue with some persuasiveness that here is another instance where the interests of truckers and air freight forwarders are in sharp conflict. It is scarcely a sufficient answer that decision as to expansion of terminal limits rests in the Board, or in the Board and the I.C.C., see Snow, Air Freight Forwarding: A Legal and Economic Analysis, 32 J. Air Law and Commerce, 485, 487-89, 492-94 (1966); the air regulatory agency is more likely to take action favorable to the air freight forwarders and thus to air transportation if the air freight forwarding industry is of one mind, than if some important members are resisting action in aid of their interest in trucking.

supra; cf. *Zantop Air Transport, Inc. v. United States*, 272 F. Supp. 265 (E. D. Mich. 1967). But while the Board was justified in considering the truckers' ability to solicit air freight along their regular routes outside the area where air forwarders can truck, once more it has failed sufficiently to explain why, as a general matter, they would be motivated to do so.

A final point of concern, although we should not have reversed on this ground, is the failure of the Examiner and the Board to relate their decision in depth to one matter on which every one was agreed. This was that with the introduction of additional jet-propelled cargo-only aircraft and more mechanization, air freight costs and rates will decrease while service will improve, so that air competition with surface transportation will become even more intense. At first blush this would seem a strange context for the grant of authorizations which, if followed as a general policy, would give motor carriers an important, if not indeed a dominant, role in air freight forwarding. Granted that the increased capacity will [307] demand ever greater sales efforts, one would wish to know why this could not be better afforded by independent air freight forwarders, now existing or entering the market as a result of the heightened prospects. We fully recognize that, as Judge Prettyman classically stated in *American Airlines, Inc. v. CAB*, 192 F.2d 417, 422 (D. C. Cir. 1951), agencies are not required to forecast the future "with mathematical precision." But the very bite of his fine opinion is that in granting new authorizations, an expert agency must look forward and make the best informed estimate that it can. We find it disappointing that, on an issue of such importance to the instant determination, that function was not more fully performed.

We would not wish to be misunderstood as ruling that even the present record might not be sufficient for the Board to initiate a properly controlled experiment in the

authorization of truckers as air freight forwarders, with the limitation on numbers and the reporting and other requirements an experiment would be expected to entail. But that is not at all what the Board did. Reading the opinion as a commitment to grant authorizations to all comers, we find it wanting in the careful investigation, the substantial evidence and the rational explication that are demanded before an expert agency may lawfully embark on a new course apparently so fraught with danger to the industry Congress has confided to its regulation and seemingly so opposed to the general policy Congress has long decreed.

The order is vacated and the cause remanded for further proceedings not inconsistent with this opinion.

MOORE, *Circuit Judge* (concurring):

I concur but only because few cases suffer and most cases benefit from as thorough a development of the facts as is feasible. I do not join in the speculative and hypothetical economic philosophies of the majority or the assumption that the Board's quite specific opinion should be read, as they apparently read it, as establishing "a policy of entry to all truckers who want to act as air freight forwarders . . ."

The only issue presented to the Board for decision was whether the applications of two motor carriers and two subsidiaries of motor carriers for domestic and international air freight forwarding authority should be granted. Hearings were conducted by the Board, the purpose of which was to determine whether traditional restrictions on surface carriers "have become outmoded for motor carriers like the applicants." The Board found that "the economics of the dynamic air cargo industry have changed drastically since those restrictions were first evolved." The

Board's decision and order were quite limited. The four applications were granted "for an experimental 5-year period" subject, however, to review "at any time the approvals granted herein or imposing at any time, with or without a hearing, such other conditions as the Board may find just and reasonable."

Our function on appeal is, or should be, to review the particular decision before us. Conversely, in my opinion, it is not to impose the social and economic views of members of the court upon the Board, the public, the motor carrier and air freight forwarding industries. Nor is it for us to suggest or devise means for protecting the weak from the strong or even to decide whether such protection is in the public interest. Congress created many regulatory agencies for many industries undoubtedly on the theory that their specialized and concentrated experience gained from facing the practical problems of particular industries would equip such agencies with a background best calculated to enable them to regulate and to balance the various aspects relating to the welfare of the industry, the public interest and competition. The Supreme Court has recently (1967) reiter-[308] ated this function of the administrative agency (with which the majority is in agreement), namely, that in the light of current relevant facts the agency may overturn past rulings and practices because "this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency." *American Trucking v. A., T. & S. F. R. Co.*, 387 U.S. 397, 416.

If the "most serious deficiency" in the Board's decision "lies in the ambiguity whether the Board has established a policy of entry to all truckers who want to act as air freight forwarders or has merely granted the four applications that were before it," by all means, remand. I, personally, find no such ambiguity. The decision itself shows its limited application. However, the Board should easily

be able to resolve any ambiguity as to the scope of its decision. Furthermore, it is in my opinion premature for the majority to concern themselves with what might happen if large numbers of motor carriers enter or seek to enter the field to "take advantage of the Board's new policy."

As to the majority's suggestion that the Board should determine in advance the effect of the general entry into air freight of motor carriers, so many variables and hypothetical situations would have to be the bases for any such speculation that the computer would have to yield to the crystal ball.

I can at least understand the majority's unwillingness to rule "that even the present record might not be sufficient for the Board to initiate a properly controlled experiment in the authorization of truckers as air freight forwarders." After all, this is an age of experimentation. It would ill become the judiciary to deprive the Board and the public as well of this modern development. However, the Board can undoubtedly buttress its position with further facts and findings. Therefore, I am willing to join in the remand to give it this opportunity.

Order No. E-25725

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 22nd day of September, 1967

MOTOR CARRIER-AIR FREIGHT FORWARDER INVESTIGATION	Docket 16857

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That operating authorizations to engage in air transportation as domestic and international air freight forwarders in accordance with the provisions of Parts 296 and 297 of the Economic Regulations of the Board be issued to CF Air Freight, Inc. and Navajo Freight Lines, Inc., for an experimental period of five years from the effective date of this order;

2. That operating authorizations to engage in air transportation as a domestic air freight forwarder in accordance with the provisions of Part 296 of the Economic Regulations

of the Board be issued to P.I.E. Air Freight Forwarding, Inc., for an experimental period of five years from the effective date of this order;

3. That the control of P.I.E. Air Freight Forwarding, Inc., by Pacific Intermountain Express Co., and the interlocking relationships involved therein be and they hereby are approved;

4. That the control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., and the interlocking relationships involved therein be and they hereby are approved for an experimental period of five years;

5. That control of CF Air Freight, Inc., by Consolidated ·ightways, Inc., and the interlocking relationships in-·ed therein be and they hereby are approved;

6. That the application of D. C. International, Inc., for authorization to engage in air transportation as a domestic and international freight forwarder be deferred for further proceedings consistent with the attached opinion of the Board;

7. That approval of the common control and interlocking relationships described in paragraphs 3, 4, and 5 hereof shall be subject to the provisions of Part 251 of the Board's Economic Regulations now in effect and as hereafter amended;

8. That the Board shall retain jurisdiction over this proceeding for the purpose of reviewing the approvals of the common control and interlocking relationships granted herein and/or of imposing at any time, with or without hearing, such other conditions as the Board may find just and reasonable; and

9. That this order shall become effective immediately.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

E-25725

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

DOCKET 16857
MOTOR CARRIER-AIR FREIGHT
FORWARDER INVESTIGATION

Decided: September 22, 1967

CF Air Freight, Inc., and Navajo Freight Lines, Inc., authorized to engage in air transportation as domestic and international air freight forwarders for an experimental period of five years;

P.I.E. Air Freight Forwarding, Inc., authorized to engage in air transportation as a domestic air freight forwarder for an experimental period of five years;

Control of CF Air Freight, Inc., by Consolidated Freightways, Inc., and the interlocking relationships related thereto approved;

Control of P.I.E. Air Freight Forwarding, Inc., by Pacific Intermountain Express Co., and the interlocking relationships related thereto approved; and

Control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., and the interlocking relationships related thereto approved for a period of five years;

Application of D. C. International, Inc., for authority to engage in air transportation as a domestic and international air freight forwarder deferred for further proceedings.

APPEARANCES:

Same as in the examiner's initial decision.

OPINION

BY THE BOARD:

This proceeding presents the question whether long-haul motor carriers of general commodities should be granted entry into the air freight forwarding field. Two motor carriers applied for domestic and international forwarding authority on their own behalf. Two other motor carriers requested similar authority through subsidiaries and applied for approval of the resulting control and interlocking relationships.

After full public hearings, Examiner Merritt Ruhlen issued his initial decision. There he concluded that the applicants should be granted authority to engage in air freight forwarding, as requested, for an experimental, five-year period. In essence, the Examiner concluded that the applicants' authorization (1) would result in a substantial benefit to the public, (2) would strengthen the air freight forwarder industry over the long run, (3) would not injure direct air carriers or cause any conflicts of interest adverse to the public, and (4) would not lead to unfair competitive practices or other illegal activities.

Exceptions and briefs have been filed[1] and the Board has heard oral argument. Upon consideration of the entire record and the parties' contentions, we conclude that all the applicants except one should receive the requested authorizations now. As to the one applicant, D. C. International, Inc. (DC), we agree with the Examiner's findings on the record, but conclude that DC's authorization should await further proceedings, as discussed below. Otherwise, we adopt, except as modified herein, the Examiner's findings and conclusions, which adequately deal with most of the contentions of the parties attacking the initial decision.[2] Accordingly, we will limit our discussion to those few points warranting additional comment.

1. Those opposing the initial decision argue that the Examiner brushed aside Board policy. Historically the Board has permitted reasonably free entry into the air-freight forwarding field for most applicants. In the case of surface carriers, however, the Board has prohibited entry "where it appeared that such conflicts of interest would arise between air and surface operations as to result in material diversion of traffic from air to surface transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding."[3] Surface carriers whose land operations

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[1] Exceptions, or exceptions and briefs, were filed by the Bureau, the Air Freight Forwarders Association and five airlines—American, Airlift, Flying Tiger, TWA, and United. Northwest filed a letter in lieu of brief. Applicants and Transcontinental Bus System filed briefs supporting the initial decision.

[2] A copy of the initial decision is attached hereto as an appendix.

[3] *Air Freight Forwarder Authority Case*, Order E-21056, July 10, 1964 (mimeo. page 4). See *Telstar Air Freight, Inc.*, Order E-22479, July 27, 1965 (mimeo. page 2).

competed substantially with air freight forwarding have not usually been granted forwarder authority.[4]

Our purpose in instituting this investigation was to determine whether our traditional restrictions on surface carriers have become outmoded for motor carriers like the applicants.[5] As the record shows, the economics of the dynamic air cargo industry have changed drastically since those restrictions were first evolved. Upon the basis of current facts, the Examiner concluded after exhaustive analysis that the applicants' entry will not lead to the ills which persuaded the Board to deny forwarder authority to some motor carriers in the past. Although predictions about the future always carry some measure of uncertainty, we are satisfied that the Examiner is correct.

The record shows that the motor carriers would have significant economic incentives to ship some cargo by air instead of by surface. A large proportion of the truckers' present surface traffic is comprised of shipments weighing less than 200 pounds. The motor carriers now transport such smaller shipments at a loss or minimal gain; they could earn more as forwarders by shipping such packages by air.[6] Obviously, the truckers' incentives to send those and other shipments by air will be far greater if they hold air freight forwarding authority than if they do not.

We believe that granting air freight forwarding authority to these applicants will in fact reduce whatever conflict of interest may exist. If there be a conflict of interest,

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[4] Compare, however, the grants of authority in *Airfreight Forwarding Investigation*, 21 C.A.B. 536, 544-46 (1955) (railroads); *Air Freight Forwarder Case*, 9 C.A.B. 473, 506-09 (1948) (interstate motor carriers); *United Parcel Managers Co.*, Order E-7324, April 22, 1953.

[5] Order E-23117, January 12, 1966.

[6] Exh. BOR-T-1, p. 49; Exh. BOR-13.

it inheres in the circumstances where the trucker may have a choice with respect to any shipment between transporting it all the way himself on the surface or turning it over to air carriers for part of the journey. Without air forwarding authority, the trucker can earn nothing by turning the shipment over to the air carriers, and hence has no incentive for doing so. As air freight forwarders, they can consolidate shipments and realize earnings from the spread between the air carrier rates for small and large shipments. Thus, this decision will provide an incentive for the truckers to utilize air carriers for shipments which are already being delivered into the hands of the truckers by the shippers. In terms of the old adage referred to by the Vice Chairman in his dissenting opinion, the rabbit is already getting the lettuce from the market. This decision will give him a reward for bringing it home instead of eating it himself along the way.

By the same token, this decision should increase the intermodal carriage of freight by air and truck. The chief reason for the anemic growth of such intermodal carriage to date may well be the lack of economic incentive for surface carriers—the lack of any reward for them with respect to that part of the journey that would be performed by air. When the incentive is provided, matters of intermodal coordination—easing and facilitating the movement of freight between transport modes—will be manageable. Without the incentive, no degree of facilitation is likely to result in much business. We regard this decision as a real breakthrough in opening up the most hopeful avenue for increasing intermodal transportation of freight by surface and air.

Similarly, providing this incentive for the truckers to utilize air carriage will make air transportation a stronger competitor for the movement of freight. This decision will remove an artificial barrier which now impedes the

effective use of the applicants' traffic generating capabilities for the benefit of air transportation. It is true that the competition of these applicants as air freight forwarders may divert some air freight gathering and consolidating activities from other air freight forwarders and from the direct air carriers themselves. On the other hand, applicants' activities might well increase the total volume of air freight forwarding activity, and its public acceptance and use, to such an extent that the results will include net gains for the other air freight forwarders and direct air carriers. In any event, we believe the public interest in the availability of additional air freight forwarding services will not permit us in this case to forbid these services in order to protect existing air freight forwarders and direct air carriers from this competition.

We concur in the Vice Chairman's view that this record suggests the necessity to expand the air freight forwarders' authority to provide pick up and delivery services in connection with air transportation beyond presently defined pick up and delivery zones. The interests of fair play as well as the public interest dictate that existing air freight forwarders should be given the maximum opportunity to use their capabilities most efficiently and effectively to meet competition in providing the best possible service without the restraint of artificial barriers. That issue is not before us in this case. However, we note that recent judicial decisions[7] have clarified the Board's authority in this regard, and we expect to move forward in this area in accord with those decisions.

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[7] *Law Motor Freight, Inc. v. Civil Aeronautics Board*, 364 F.2d 139 (1 Cir. 1966); *National Motor Freight Traffic Assoc., Inc. v. Civil Aeronautics Board*, 374 F.2d 266 (D.C. Cir. 1966). Certiorari was denied in both cases on May 15, 1967, 387 U.S. 905.

The applicants' entry into the field is likely to produce important public benefits. In reliance upon predictions of an enormous growth in air freight, the direct air carriers have ordered new aircraft increasing their cargo capacity several fold, although nearly 80 percent of their past cargo capacity has gone unused. As the Examiner found, air cargo's growth is substantially dependent upon the extent to which it is promoted. The record shows that increased promotional efforts, such as the applicants can and will provide, can produce new air cargo traffic. The participation in air freight forwarding of motor carriers like the applicants may well be necessary to achieve the full promise of air cargo. For all these reasons, we are convinced that a new policy towards motor carriers like the applicants deserves a trial.

2. The Air Freight Forwarders Association and the airlines also asserted at oral argument that the Examiner failed to find that the applicants would stimulate the growth of air cargo. Read as a whole, however, the initial decision is sufficiently explicit and does so find, we believe. In any event, we make a similar finding ourselves, based upon the applicants' operational plans.

Those plans belie the contentions that the applicants' operations will be limited to air cargo markets which are already developed adequately. The existing air freight forwarders now gather over three-quarters of their traffic from ten top cities. The applicants plan to open new stations immediately in twelve cities not among the top ten, with auxiliary stations or future plans for another seventeen cities.[8] Markets like Honolulu, Buffalo, Washington, Baltimore, and New Orleans are under-developed in comparison with the top ten cities and will benefit from the stimulation of the applicants' promotional efforts.

[8] Compare I.D. 11-17 and Exh. PIE-2 with Exh. CF/PIE 9.

Moreover, the applicants should be able to aid in developing new traffic enplaned at the top ten cities. The existing forwarders now seek freight mainly within the so-called pickup and delivery zones, generally located within a 25-mile radius of an airport. In contrast, the applicants plan to tap many shipping sources located beyond the metropolitan areas, either along the applicants' own extensive motor carrier routes or along the routes of hundreds of regional motor carriers with whom the applicants regularly interline traffic. If the applicants possess air freight forwarder authority, the incentives for truckers to develop such beyond-area traffic are increased. And, of course, the applicants will provide the normal competitive spur to traffic promotion within the metropolitan areas.

3. The Air Freight Forwarders Association excepted to DC's authorization upon the additional ground that DC is controlled by National City Lines, Inc., a motor carrier holding company. After DC filed its application with the Board, National purchased 17.7% of DC's stock and later increased its ownership to approximately one-third of DC's outstanding shares. No application requesting approval of National's control of DC was filed, and upon this record the Examiner found that it was impossible to determine if National controls DC.

On brief, we are adivsed that the ICC recently authorized National to purchase 300,000 shares of DC's equity, in addition to the 420,662 shares it presently owns. DC does not dispute that it is controlled by National and stated at oral argument that National will file an application with the Board for approval of the control relationship with DC "in the near future." In these circumstances, we believe that DC's authorization should await further proceedings on National's application. If that application poses no issues different from those raised by the section

408 applications approved herein, we anticipate that the application can be processed routinely and that DC's authorization can be issued promptly.

We have considered the other contentions of the parties objecting to the initial decision, and, to the extent not specifically dealt with by the Examiner or herein, we find them to be unpersuasive.

Accordingly, in view of the foregoing and all the facts of record, we find:

1. That CF Air Freight, Inc. and Navajo Freight Lines, Inc. should be authorized to perform air transportation as domestic and international air freight forwarders and that P.I.E. Air Freight Forwarding, Inc. should be authorized to perform air transportation as a domestic air freight forwarder, each for an experimental period of five years;

2. That CF Air Freight, Inc., Navajo Freight Lines, Inc., D.C. International, Inc., and P.I.E. Air Freight Forwarding, Inc., are fit, willing, and able to conform to the provisions of the Federal Aviation Act and the Board's rules and regulations thereunder;

3. That approval should be granted to the control of CF Air Freight, Inc. by Consolidated Freightways, Inc.; to the control of P.I.E. Air Freight Forwarding, Inc. by Pacific Intermountain Express Co.; and to the control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., the last for a period of five years;

4. That approval should be granted to the interlocking relationships between the officers and directors of Consolidated Freightways, Inc. and CF Air Freight, Inc.; of Pacific Intermountain Express Co. and P.I.E. Air Freight Forwarding, Inc.; and of Pacific Intermountain Express Co. and National Air Freight Forwarding Corporation;

5. That D. C. International, Inc. should be authorized to perform air transportation as a domestic and international air freight forwarder for a period of five years if National City Lines, Inc. files with the Board a satisfactory application for approval of control of D. C. International, Inc. and if such application is approved;

6. That said approvals of the control and interlocking relationships described in paragraphs 3 and 4 above shall be subject to the provisions of Part 251 of the Board's Economic Regulations now in effect and as hereafter amended;

7. That the Board shall retain jurisdiction over this proceeding for the purpose of reviewing at any time the approvals granted herein or of imposing at any time, with or without hearing, such other conditions as the Board may find just and reasonable.

An appropriate order will be entered.

MURPHY, Chairman, MINETTI, GILLILLAND and ADAMS, Members, concurred in the above opinion. MURPHY, Vice Chairman, filed the attached dissent.

MURPHY, VICE CHAIRMAN, DISSENTING:

This is a perplexing case since its consequences will transcend the confines of the limited record developed by the applications of the four long-haul motor carriers immediately presented to us. The policy issues will have relevance throughout the entire motor carrier industry as well as other modes of surface transportation.

It is not easy to clearly define the true impact of the long-haul truckers' entry into air freight forwarding on the future development of our air transportation system. My colleagues conclude that the public interest will be served by authorizing such entry into air freight forwarding

for a limited trial period of five years. I fully respect the cogency of that judgment by a majority of the Board; however, I am unable to reach a similar view. Taking one consideration with another, I am persuaded that because of likely anti-competitive results such entry is not desirable at this time and that it is contrary to the public interest.

First, it should be noted that this case has nothing to do with enhancing intermodal coordination—easing and facilitating the movement of freight between transport modes. Other procedures are available, or can be created, to that very worthwhile end[9] and, no one seriously suggests the contrary. Thus, the applicants, as truckers, come before us with no favored status other than their acknowledged economic strength and surface experience.

Our function in the present case is to determine what is best for the promotion and development of air transportation, specifically air freight—for the shippers and for the air carriers. It is significant, however, that no direct air carrier supports the truckers' entry as potential salemen for its services. Indeed, many of them opposed these applications. Additionally, the shipper testimony in this record—testimony of 19 shipper witnesses called by the applicants—is wholly unconvincing that any substantial benefits to the shipper public will result from these authorizations. Moreover, it is the contention of bureau counsel that the motor carrier applications should be denied for important public policy reasons of an anti-competitive character.[10]

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[9] As a matter of fact, this record suggests the necessity for action to expand the air freight forwarders' authority to provide service with their own, or contracted, trucks to areas beyond presently defined pickup and delivery zones.

[10] Bureau counsel contends (1) that there is serious doubt that motor carrier-air freight forwarders would have normal incentives

(Continued)

There is no question that at this time air freight and truck freight are competitive in some substantial part. There is no question that the expected growth of air freight will, in consequential part, result from a penetration of general commodity truck freight.[11] There does not seem to be much doubt that the profit incentive of trucker-air freight forwarders would militate against their developing air freight at the expense of truck freight. Hence, the conflict of interest concern expressed by the direct air carriers, the air freight forwarders and the bureau counsel is truly more real than imaginary. There is a great deal of wisdom in the old adage that one does not send a rabbit to market for lettuce.

I have always recognized the need for effective competition to assure the fullest development of the air transportation system so as to meet the growing needs of our foreign and domestic commerce. However, in the instant case I believe that permitting the entry of entities having such clearly defined conflicts of interest may bring about anti-competitive results rather than free competitive benefits. Whether motor carrier-air freight forwarders would

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(Footnote 10 Continued)
to divert surface freight to air since surface and air transportation are competitive modes of transportation and diversion of traffic from surface to air would reduce applicants' system profitability; (2) that licensing of motor carriers as air freight forwarders will make air transportation less competitive with surface transportation because motor carrier-air freight forwarders could dominate the air freight forwarding industry and by virtue of such domination they will be able to adversely affect the direct air carriers' competitive efforts; and (3) that the licensing of motor carrier-air freight forwarders will not result in any significant or unique public benefits and is not necessary to obtain improved surface-air transportation service.

[11] The Bureau of Economics of the Interstate Commerce Commission, in a recent report entitled *Air-Truck Coordination And*
(Continued)

eventually dominate the air freight forwarding industry through their superior economic strength remains to be seen. I would hope that such would not be the case, but in any event, I share an apprehension that through such entry by these and other surface carriers our direct air carriers would be made dependent upon their competitors for a major portion of their freight and cargo business. The evils of such a situation are apparent and need no elaboration.

I seek the fullest development of the air freight industry but no special consideration other than the inherent advantages of the air transport mode. That, to my mind, requires clear-cut, single-minded promotion and selling. It requires continuing improvement in the product offered for sale in terms of rates and service. The truckers can make little, if any, contribution to an improved air transport product for sale. On the other hand, their operations will have a seriously diversionary impact upon air forwarders, who are only now achieving some modest financial stability, and could adversely affect direct air carriers. I am unable to perceive, on this record, public benefits from trucker entry into air forwarding that would justify the anti-competitive risks involved.

/s/ Robert T. Murphy

(Footnote 11 Continued)

Competition, Statement No. 67-1, February, 1967, concluded that "the airlines may increasingly bid for a wide range of commodities which in the past have moved primarily by surface carriers. This will have the effect of increasing competition between air cargo carriers and long-haul motor carriers of freight at the same time that corrdination is increasing the interchange of air cargo with short–and medium-haul truck lines." p. 3.)

APPENDIX

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

MOTOR CARRIER-AIR FREIGHT
FORWARDER INVESTIGATION

DOCKET 16857

INITIAL DECISION OF EXAMINER
MERRITT RUHLEN

Served: April 27, 1967

Upon:

James M. Verner, Suite 1035, Universal Building North, 1875 Connecticut Avenue, N.W., Washington, D. C., 20009, for Consolidated Freightways, Inc., Pacific Intermountain Express Co., CF Air Freight, Inc., and P.I.E. Air Freight Forwarding, Inc.

Jerrold Scoutt, Jr., 888 - 17th Street, N.W., Washington, D. C., 20030, for D. C. International, Inc.

Raymond J. Rasenberger, 888 - 17th Street, N.W., Washington, D. C., 20030, for Navajo Freight Lines, Inc.

Louis P. Haffer, 703 Ring Building, Washington, D. C., 20036, for Air Freight Forwarders Association.

John Law Elliott, 912 American Security Building, Washington, D. C., 20005, for Airlift International, Inc.

Edwin I. Colodny, Washington National Airport, Washington, D. C., 20001, for Allegheny Airlines, Inc.

Gerry Levenberg, 1707 L Street, N.W., Washington, D. C., 20036, for American Airlines, Inc.

Calvin Davison, 1001 Connecticut Avenue, N.W., Washington, D. C., 20036, for Eastern Air Lines, Inc.

Robert M. Hausman, 1 Farragut Square South, Washington, D. C., 20006, for The Flying Tiger Line Inc.

Frank Loughran, 21st Floor, Shell Building, San Francisco, California, 94104, for ILM International, Inc.

Robert N. Duggan, 710 Ring Building, Washington, D. C., 20036, for Northwest Airlines, Inc.

Howard S. Boros, 711 Fourteenth Street, N.W., Washington, D. C., 20005, for Transcontinental Bus System, Inc.

Ulrich V. Hoffmann, 605 Third Avenue, New York, New York, 10016, for Trans World Airlines, Inc.

John D. Devaney, P. O. Box 8800, Chicago, Illinois, 60666, for United Air Lines, Inc.

Theodore Hardeen, Charlottesville, Virginia, for Virginia Trailways.

Howard G. Feldman, Civil Aeronautics Board, Washington, D. C., 20428, for the Bureau of Operating Rights.

This initial decision is rendered pursuant to the authority delegated to Examiners under Rule 27 of the Rules of Practice in Ecomomic Proceedings. It becomes effective as the final order of the Board 30 days after service thereof unless a petition for discretionary review is filed within 25 days after service thereof in accordance with Rule 28, or the Board issues an order within said 30-day period to review upon its own initiative. If a petition for discretionary review is timely filed or action to review is taken by the Board upon its own initiative the effectiveness of this initial decision is stayed until further order of the Board.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

MOTOR CARRIER-AIR FREIGHT
FORWARDER INVESTIGATION
DOCKET 16857

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1. CF Air Freight, Inc., Navajo Freight Lines, Inc., and D. C. International, Inc., authorized to engage in air transportation as domestic and international air freight forwarders for an experimental period of five years;

2. P.I.E. Air Freight Forwarding, Inc., authorized to engage in air transportation as a domestic air freight forwarder for an experimental period of five years;

3. Control of CF Air Freight, Inc., by Consolidated Freightways, Inc., and the interlocking relationships related thereto approved;

4. Control of P.I.E. Air Freight Forwarding, Inc., by Pacific Intermountain Express Co., and the interlocking relationships related thereto approved; and

5. Control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., and the interlocking relationships related thereto approved for a period of five years.

Appearances:

James M. Verner and *Eugene T. Liipfert,* for Consolidated Freightways, Inc., Pacific Intermountain Express Co., CF Air Freight, Inc., and P.I.E. Air Freight Forwarding, Inc.

Jerrold Scoutt, Jr., and *John H. Quinn, Jr.*, for D. C. International Inc.

Raymond J. Rasenberger, for Navajo Freight Lines, Inc.

Louis P. Haffer and *Andrew P. Goldstein*, for Air Freight Forwarders Association.

John Law Elliott, for Airlift International, Inc.

Edwin I. Colodny and *David B. Armstrong*, for Allegheny Airlines, Inc.

Gerry Levenberg and *Roger P. Craig*, for American Airlines, Inc.

Calvin Davison and *Patrick W. Lee*, for Eastern Air Lines, Inc.

Robert M. Hausman, for The Flying Tiger Line Inc.

Frank Loughran, for ILM International, Inc.

Robert N. Duggan and *Fredrick S. Hird, Jr.*, for Northwest Airlines, Inc.

Howard S. Boros and *Warren Goff*, for Transcontinental Bus System, Inc.

Ulrich V. Hoffmann, for Trans World Airlines, Inc.

John D. Devaney, for United Air Lines, Inc.

Theodore Hardeen, for Virginia Trailways.

Howard G. Feldman, for the Bureau of Operating Rights.

INITIAL DECISION OF EXAMINER MERRITT RUHLEN

This proceeding presents the question whether long-haul motor carriers of freight should be authorized to act as air freight forwarders either directly or through subsidiaries. CF Air Freight, Inc. (CF), D. C. International, Inc. (D. C.), and Navajo Freight Lines, Inc. (Navajo), have applied for domestic and international air freight forwarding authority. CF is a wholly-owned subsidiary of Consolidated Freightways, Inc., a long-haul motor carrier of general commodities. Approval of such control and of the interlocking relations related thereto area also sought. Pacific Intermountain Express Company, (P.I.E.) seeks, through its subsidiary P.I.E. Air Freight Forwarding, Inc. (PAFF), authority to operate as a domestic air freight forwarder and its eeks approval of the control of National Air Freight Forwarding Corp. (NAF), an international air freight forwarder, and other related control and interlocking relations.

Airlift International, Inc.; Allegheny Airlines, Inc.; American Airlines, Inc.; Continental Air Lines, Inc.; Delta Air Lines, Inc.; Eastern Air Lines, Inc.; Northwest Airlines, Inc.; The Flying Tiger Line Inc.; Transcontinental Bus System, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; and the following air freight forwarders, ABC Air Freight Company, Inc.; Acme Air Cargo, Inc.; ADD Airfreight Corporation; Airborne Freight Corporation; Air Express International Corporation; Air-Land Freight Consolidators, Inc.; Air-Sea Forwarders, Inc.; Airways Air-freight; American Express Company; Barnett Air Cargo, Inc.; Peter A. Bernacki, Inc.; Domestic Air Express; Emery Air Freight Corporation; Hensel, Bruckmann & Lorbacher, Inc.; International Customs Service, Inc.; H. G. Ollendorff, Inc.; Pacific Air Freight, Inc.; Panalpina Air Freight, Inc.; Penson Forwarding Corporation; Routed Thru-Pac, Inc.; and WTC Air Freight, represented by the Air Freight

Forwarders Association, have been permitted to intervene. A public hearing was held in San Francisco, California, and Washington, D. C., and briefs have been submitted.

AIR FREIGHT FORWARDING

The air freight forwarding industry consists of a group of more than 100 companies engaged in the shipping of air cargo. The following is a brief description of an air freight forwarder's function and method of operation.

The air freight forwarder holds himself out to the general public as a common carrier of property in interstate commerce. He assumes responsibility for carriage of the cargo from point of receipt to point of ultimate destination and assembles and consolidates that property into bulk shipments which, at some terminal point, he breaks up and distributes, using the services of a direct air carrier for the whole or some part of the transportation.

The forwarder publishes his own tariffs, quoting through rates for the transportation offered, issues his own bill of lading to the shipper, determines the routing, and selects the originating and connecting carrier or carriers over which the shipment is to move. He occupies the position of the carrier in relation to the shipper who is usually unaware of the identity of the underlying carrier. In tendering the various shipments to the direct carrier in consolidated lots, the forwarder lists himself as both consignor and consignee.

The forwarder ordinarily charges the shipper a rate approximating that which the shipper himself would have to pay were he to move his own shipment in the small-bulk service of the underlying carrier, and he pays the underlying carrier the lower volume rate available from his consolidations. This spread represents the earnings of the forwarder from which must be deducted all operating and overhead expenses.

The air freight forwarders may also perform pickup and delivery service of air freight within the terminal zone. Under section 403(a) of the Federal Aviation Act, air carriers (direct or indirect) may publish tariffs indicating pickup and delivery rates, *i.e.*, for door-to-door service, as a service in connection with air transportation. This service may be offered in terminal areas, generally deemed to be any point within a 25-mile radius of the airport or the city limits of the certificated point served by that airport.

As of December 31, 1966, there were 137 air freight forwarders[1] holding a total of 102 domestic licenses and 105 international licenses. Total tonnage tendered to the direct air carriers by forwarders increased from 114,619 tons in 1961 to 200,278 tons in 1964. Domestic air freight forwarder tonnage increased 66 percent between 1961 and 1964 and international tonnage increased 129 percent. In 1964, 99 percent of the domestic shipments tendered to air freight forwarders were consolidated and the average number of shipments per domestic consolidation increased from 4.81 in 1962 to 7.08 in 1964. The percentage of international shipments consolidated increased from 47 percent in 1962 to 56 percent in 1964, and the number of shipments per international consolidation increased from 3.05 in 1962 to 4.44 in 1964. In 1964, 22.2 percent of the interstate air-cargo market represented forwarder-generated traffic as compared to 20 percent in 1962.[2]

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[1] Seventeen of the 137 were limited to the forwarding of household goods. Of these 17 companies, 16 had both domestic and international authority and one possessed only international rights.

[2] In 1964, interstate direct air carrier air cargo amounted to 734,570 tons as compared to 550,269 tons in 1962.

The top ten forwarders[3] in 1965 received $119,389,000, or 72.8 percent of the total air freight forwarding revenues. This was a drop from 91 percent in 1961. During 1965, the same ten forwarders had $7,168,424 in overall profits before taxes, or 65.9 percent of the total for all forwarders; $7,041,961 in air freight forwarding profits, or 118.4 percent of the total (net total for all other forwarders was an operating deficit of $1,094,888 in 1965); total assets of $24,119,317, or 43.5 percent; and $8,995,779 in proprietary capital, or 50.6 percent.[4]

The share of Emery, the leading forwarder, in forwarder revenue decreased from 31 percent in 1961 to 30 percent in 1965. During 1965, it had overall profits of $5,260,046, or 48.4 percent of all forwarders; total profits from air freight forwarding only of $5,464,458, or 91.8; total assets of $9,063,172, or 16.3 percent; and a net worth of $6,104,058, or 34.3 percent.[5]

A chart showing the overall profit or loss, the air freight forwarding profit and loss for each forwarder for each year 1961 through 1965, and for the first half of 1966, is included in appendix 1. Appendix 1 also shows the net worth and the total assets of each forwarder as of June 30 of each year 1962 through 1966.

The air freight forwarding industry has been growing more rapidly than the growth of air cargo in the last few years. The leading forwarders have substantial assets,

[3] On the basis of air freight forwarding revenues, the top ten were: Emery; Airborne; WTC; Air Express; United Parcel; Wings & Wheels; Pacific; ADD; ABC; and Air Dispatch. American Express deleted to eliminate distortion resulting from size and comparatively insignificant percentage of income from air freight forwarding operations.

[4] See appendix 1.

[5] See appendix 1.

have made substantial profits, and are in a strong financial position. Some air freight forwarders have dropped out and some are incurring operating losses at present. During the period 1962 through 1965, 23 air freight operating authorizations were revoked for dormancy but the total number of air freight forwarder authorizations increased from 36 in 1955 to 137 at the beginning of 1967.

AIR CARGO

Air freight revenues have shown steady growth throughout the years since 1951 for both domestic and international-territorial traffic, rising from $59.6 million in 1951 to $356.1 million in 1964 for a compound growth rate of 14 percent in the domestic market and 13.1 percent in the international-territorial market. Between 1964 and 1965, the comparable growth rates were 22.3 percent and 28.2 percent. The growth rate of domestic freight ton-miles has greatly exceeded the growth rate of domestic revenue passenger-miles. The contrast is even greater in favor of air freight in the international-territorial market.

Assuming a 100 percent passenger load factor, the unused freight ton-mile capacity of the domestic trunk airlines has been increasing between 1951 and 1965, at a compound growth rate of 16.6 percent, and in 1965 the unused capacity exceeded 3 billion ton-miles. Throughout this 15-year period, the average freight load factor has been only 20.44 percent and in 1964 was 21.7 percent.

This rapid air-cargo growth should continue. The potential rate of expansion depends on several variable factors, the exact effect of which cannot now be determined. Some of these are the size of the market, the availability of cargo space, the comparative costs of surface and air

transportation, and the quality and the intensity of the promotion of the various modes of transportation.

Although the exact size of the potential air-cargo market is difficult to determine, the total domestic cargo market is a reservoir of additional air cargo. During 1965, there were 1,643.4 billion ton-miles of intercity cargo of which 187.9 were carried by the airlines, 370.8 by the motor carriers, 704.6 by the railroads, and 256 by inland waterways. Although the great bulk of this traffic is not divertible to air transportation at the present time, only a slight invasion of this market will result in an enormous increase in air cargo.

The air freight forwarders by eliminating motor carrier traffic that is not federally regulated, traffic that is not carried by General Freight operations, and traffic that travels in truckload lots reduce the maximum motor carrier traffic available for diversion to air to 22.6 billion ton-miles annually. Of this total, the forwarders say that a substantial part is either short-haul or low-value cargo not susceptible to diversion to air transportation.

Assuming this is true, a market of 22 plus billion ton-miles of less than carload lot motor carrier traffic offers a rich source of cargo for an industry which in 1965 captured less than 2 billion ton-miles. Furthermore, it is obvious that some cargo carried in truckload lots, by other than General Freight operations, or not subject to federal regulation can be diverted to air. In addition, railroad traffic will also be subject to diversion to air to some extent. It is clear that a vast market is available for the air cargo promoter.

During the past few years there has been no shortage in available air freight ton-miles. For the future, the prospects are even more promising. As of November 27, 1966, the nation's scheduled airlines were operating 96 jet aircraft capable of all-cargo service with a capacity of

4 billion ton-miles annually. In addition, a substantial volume of turboprop and piston aircraft capacity was available. Jet aircraft on order for delivery by 1970 will increase the capacity available to 6.5 billion ton-miles. (Of the 161 aircraft on order, 153 have delivery dates not later than 1968.) With total air freight ton-miles of 1.73 billion in 1965, the capacity available will permit more than a threefold expansion by 1970.[6]

The cost ratios are also favorable to the expansion of air freight. With the advent of the jets, freight revenues per ton-mile have decreased substantially. Since 1960, all-cargo revenues per ton-mile for domestic operations have decreased from 17.82 cents to 13.64 cents as of September 30, 1965. For international and territorial operations, the decrease was from 25.72 cents to 14.63 cents. With the introduction of the larger jets and more mechanization this trend should continue. As the difference in cost between air and surface carriage decreases the advantages of air service will increase and the switch to air service will continue at a rapid pace.

The actual rate of growth of the air-cargo industry will depend primarily upon the zeal, effort, and resources of those promoting air transportation and the comparative quality of service each mode can provide. During the last 20 years the promoters of air transportation have been able to divert that cargo which was peculiarly adapted to air transportation, i.e., where speed was all important. In addition, in-depth analyses of shippers' total transportation, communications, and storage costs have disclosed numerous other situations in which it was economically advantageous to ship some or all of their products by air. This traffic has also been diverted.

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[6] Air Transport Association of America, Press Release, November 27, 1966.

Although the national economic growth will no doubt cause a steady increase in the volume of products which now travel by air, the largest potential source of additional air cargo lies in such in-depth analysis of a shipper's operating problems. Such an analysis includes determining the comparative cost of warehousing, damage claims, communications, storage, use of money, size of inventories, packing costs, and many other factors. Only after a thorough study can a shipper determine the optimum mode of transportation for each product in each circumstance.

Such studies will disclose that some articles now traveling by air should travel by surface, and some now traveling by surface should travel by air and that the optimum mode of transportation will be constantly changing dependent on comparative costs, comparative speeds, and various other factors. Inasmuch as air is the most recent form of transportation to be developed, and the plans of most industries were originally based on surface transportation, a thorough reevaluation of a firm's transportation problems frequently indicate a shift initially to greater use of air service.

The rate of growth of air-cargo transportation will depend substantially upon the extent to which it is scientifically promoted by organizations which can provide satisfactory service. Thus, although the entry of new forwarders will no doubt divert some traffic from the existing forwarders, there is sufficient business available to support the existing forwarders and the applicants herein. The addition of competent new forwarders will increase the rate of air-cargo growth.

APPLICANTS

CF Air Freight, Inc.

CF, an applicant herein for air freight forwarding authority, is a wholly-owned subsidiary of Consolidated Freightways, Inc. Its operational and organizational plans are as follows: The president of CF will report directly to the president of the parent company, will be held accountable for the growth and profitability of CF, and will not be required to take into account the interests of its surface carrier affiliates or other components of the Consolidated Freightways. CF will have available to its staff assistance from the parent company and from Consolidated Freightways Corporation in the treasurer's function in purchasing, in equipment selection and procurement, and in obtaining fuel and printing supplies; in accounting data collection, processing, and report preparation; in revenue accounting and collecting; and in claims and insurance administration.

Subject to the above exceptions CF plans an operation as nearly autonomous as possible. Pickup and delivery of air freight as well as terminal operations will be performed, in most instances, with equipment and facilities devoted exclusively to air freight. It will also establish its own marketing organization which will institute specialized marketing programs.

During the first 6 to 12 months of operation, CF will institute air freight forwarding activities at Los Angeles and San Francisco, Calif., New York, N. Y., and Chicago, Ill. Stations will be located on leased space, if available, near the major airport at each city. Freight handling docks will be provided for receiving, transferring, consolidating, and temporarily storing freight, and office space will be obtained for administrative, sales, and customer service activities. Suitable pickup and delivery

equipment, radio dispatched and controlled, will be provided at each station. CF estimates capital requirements of approximately $155,000 at each station.

CF forecasts first year revenues of approximately $1,500,000. Assuming that its growth will be no less than the average growth experienced by the industry, it estimates minimum revenues of $7.8 million in the fifth year of operations. After a first year loss of $25,000, CF forecasts profits increasing from $33,000 in the second year to $291,000 in the fifth year. At least two stations will be added yearly at a cost for new equipment and terminals of approximately $310,000. Replacements and additions will increase from $150,000 in the second year to $225,000 in the tenth year. Consolidated Freightways, Inc., will make the necessary capital available to CF to enable it to make the necessary additional investments.

Consolidated Freightways, Inc., is also the parent company of a group of companies engaged in transporting property by motor vehicle and in related activities. The principal motor carrier operations of Consolidated Freightways are carried on through Consolidated Freightways Corporation of Delaware, a carrier of general commodities authorized by the Interstate Commerce Commission to operate in 31 states and the District of Columbia. In 11 of these states it also holds intrastate authority and it operates the 7-state authority of Southern Plaza Express pending disposition of an application for authority to acquire that carrier.[7] Consolidated Freightways Corporation

[7] Southern Plaza holds interstate authority in Arkansas, Illinois, Kansas, Missouri, Oklahoma, Tennessee, and Texas. It holds intrastate authority in Illinois, Missouri, Oklahoma, and Texas.

also conducts extensive operations transporting bulk commodities in tank vehicles through a separate operating division, and conducts warehousing and cartage operations in four principal west coast cities through another division. Carrier operations are conducted in Western Canada through a separate carrier company, Canadian Freightways Limited.

Consolidated Freightways maintains 109 general commodity terminals throughout the 35-state area served. The total investment in general commodity terminals on August 31, 1965, was $18,291,347. Net investment in line-haul equipment on the same date was $15,875,221 and in pickup and delivery equipment, $5,169,641. Its terminals are connected by an extensive communications network used for dispatching freight, tracing shipments, data transmittal, and for other communications requirements. Centralized revenue accounting facilities, including the most modern computer and data retrieval equipment, are maintained at Portland, Oreg.

In addition to its carrier operations, Consolidated Freightways has extensive non-carrier, though generally transportation-related activities. These activities include manufacture of heavy-duty trucks and tractors, manufacture of springs, castings, and related parts, manufacture of truck refrigeration equipment, and the leasing of trucks and other transport equipment.

The gross revenues of the Consolidated Freightways companies in 1964 were $256,629,000 of which $159,634,000 or 62 percent, was derived from carrier operations. Consolidated's net worth, or shareholder's equity, was $44,644,000 at the end of 1965 and net income after provision for income taxes was $8,804,000.

Revenues in 1965 exceeded those of the previous year by $46,503,000 or 22 percent. In 1965, revenues exceeded those of 1956 by $193,301,000 an increase of more than

305 percent in a 9-year period. During the same period, net income increased from $1,303,000 to $8,804,000 and earnings rose from $1.06 per share to $3.40 per share.

D. C. International, Inc.

D. C. is a common motor carrier of general commodities from coast to coast and border to border. It seeks direct authority to operate as an air freight forwarder; its operating plans are as follows: D. C. will appoint a vice president-general manager to head a new air freight division of the corporation. He will report directly to the president and will be responsible for air freight forwarding. The surface and air freight operations will be integrated to the maximum extent possible. For example, accounting, data processing, purchasing, claims, insurance, and other departments will be operated as one unit.

D. C. will add approximately 100 employees for its air freight forwarding. In each of the terminals selected for air freight forwarding, there will be an assistant terminal manager in charge. Certain personnel such as dock hands and pickup and delivery workers will work jointly for the air freight and surface departments. One or more clerks will be assigned initially to each terminal to work on air freight forwarding matters exclusively.

It will initially commence operations at the following 12 cities: Boston, Mass., Chicago, Cleveland, Ohio, Denver, Colo., Detroit, Mich., Kansas City, Mo., Los Angeles, New York, Portland, St. Louis, Mo., San Francisco, and Seattle, Wash.

At six of these locations, i.e., Chicago, Cleveland, Detroit, New York, Los Angeles, and San Francisco, D. C. will lease special facilities near the airport. Its estimated cost at each city is shown below:

City	Total Sq. Ft.	Amount Per Sq. Ft.	Total Cost 1 Year
Chicago	5,000	$3.00	$ 15,000
Cleveland	3,500	3.00	10,500
Detroit	3,500	3.00	10,500
New York City	6,000	4.50	27,000
Los Angeles	6,000	4.00	24,000
San Francisco	5,000	3.00	15,000
		Total	$ 102,000

Eventually, D. C. will build its own air freight terminals.

The present motor carrier terminals will be used at the order cities for the time being. In addition, the terminals in Chicago and North Bergen, N. J., can handle traffic destined for the Midway and Newark, N. J., airports, respectively. At each of these terminals, space will be set aside to sort and segregate air freight from surface freight.

As traffic warrants, D. C. will expand to the following cities where it presently has terminals: Buffalo, Albany, and Syracuse, N. Y.; Toledo, Ohio; Louisville, Ky.; Omaha, Lincoln, and Grand Island, Nebr.; and Phoenix, Ariz.

Further expansion plans call for opening stations at the following points: Milwaukee, Wis.; Rochester, N. Y.; Philadelphia, Pa.; Atlanta, Ga.; Cincinnati and Dayton, Ohio; Indianapolis, Ind.; and San Diego, Calif. At each of these points, D. C. already has sales personnel.

For pickup and delivery of air freight, D. C. will use standard 1 1/2-ton trucks, some of which are equipped with mechanical lift-gates; this type of equipment is presently used by D. C. for motor carrier pickup and delivery. D. C. will acquire 59 new pieces of such equipment for air freight forwarding. The air freight pickup and delivery operations will be entirely separate from the surface operations. A radio-controlled dispatch system is

operational in seven of D. C.'s initial cities and will be installed in the other five when air freight forwarding operations commence.

D. C. has an extensive nationwide communications network available for air freight forwarding. Full information about each freight bill representing a shipment within the D. C. system will be instantly transmitted to a central file. Once in storage, this information will be available to any D. C. terminal.

All of D. C.'s salesmen will be trained to sell and promote the use of air freight, but in addition, it will employ eight air freight specialists initially to develop air freight at Chicago, Los Angeles, New York, and San Francisco. These salesmen will sell directly and will assist the surface-freight salesmen with the shipping problems of any customer.

D. C.'s public relations budget for 1966, including advertising expense, was approximately $400,000. Air freight will be promoted along with D. C.'s other operations. D. C. expects to initially invest about $575,000 in its air freight forwarding business. Assuming that 2,500 tons of domestic air freight and 1,000 tons of international air freight are generated, D. C. forecasts initial operating earnings of approximately $185,000. It concedes, however, that that the first year's operation may sustain a slight loss.

As of April 1, 1966, it had 3,141 employees in 24 locations throughout the country. Its October 1, 1966, balance sheet shows assets of over $26.5 million and a net stockholder equity of over $8.7 million. The company's consolidated earnings (after taxes) for the period ending September 30, 1966, were $860,044 after deducting nonrecurring losses of $1,653,758. In 1965, the company had net income of $3,016,743.

Navajo Freight Lines, Inc.

Navajo is a long-haul motor carrier operating 43 motor freight terminals throughout the United States. It recently opened new terminals at St. Louis, Albany, and Santa Fe, N. Mex. It plans new terminals at La Salle, Ill., Jersey City, N. J., Philadelphia, and West Haven, Conn. In 1965, it had assets of $27,258,706, an increase of 25 percent over 1964. During 1965, operating revenues were $34,715,766, and net earnings, after taxes, were $688,290, almost double the $353,992 earned during 1964.

Its plans are as follows: Air freight forwarding will be established as a separate division of the parent company under its own general manager. The staff, at the beginning, will include a general operations manager, a general sales manager, and a manager of rates and tariffs. District managers and terminal managers will operate in the field.

Air freight service will be established initially in the following cities: Boston, Chicago, Denver, Cleveland, Buffalo, New York, Baltimore/Washington, D. C., St. Louis, Kansas City, San Francisco/Oakland, Calif., and Los Angeles. Navajo will commence air freight operations using its surface facilities and when the traffic volume requires separate facilities, they will be established at or near the airports. With further traffic increases, new stations will be opened in additional cities.

Air freight forwarding will be promoted by 25 full-time salesmen. A separate sales manager will be responsible for developing international traffic, and two foreign sales representatives will promote traffic in Europe and the Far East.

Navajo will use its existing pickup and delivery fleet augmented by vehicles assigned directly and exclusively to the air freight division. It presently operates 831 pieces of pickup and delivery equipment and will acquire 23

additional pieces for air freight forwarding. In the larger cities pickup fleets will be equipped with radio communication units.

Navajo's presently existing nationwide communication network and its computer billing system will be available to the air freight division. The cargo handling procedures will be similar to those used by existing air freight forwarders.

The air freight forwarder division will promote its services in conjunction with the promotions of the motor carrier division. These consist of trade journal advertising, direct mail, and bulletins handed out by salesmen.

Navajo does not plan rates to undercut either direct carriers or air freight forwarders. Rates will be directly related to the type of service performed and it is considering offering more than one class of service; one at a high rate based on speed and personalized handling, and another, a slower service at a lower rate.

It will initially invest between $400,000 and $500,000. It assumes that 2,250 tons of domestic air freight and 550 tons of international air freight will be generated and forecasts operating earnings of approximately $120,000. This forecast assumes a start-up period of approximately 6 months.

Pacific Intermountain Express Co.

P.I.E. is a motor carrier of general commodities on the west coast and transcontinentally. It also engages in bulk commodity transportation. In its general commodity operations, it has authority to serve more than 6,000 points, and operates 68 terminals in 27 states on a 38,000 mile route system. Gross revenues of P.I.E. (General Commodities Division) and All States Freight, Inc., (ASF), now

merged into P.I.E., exceeded $93 million in 1965. In 1965, P.I.E.'s net income amounted to $2.5 million and at year's end, its net worth was $20.4 million and its total current assets of $18.1 million compared with total current liabilities of $15 million.

P.I.E. plans its air freight forwarding operations through a subsidiary, P.I.E. Air Freight Forwarding, Inc. (PAFF). Certain staff functions, such as finance, accounting, labor, safety, purchasing, communications, advertising, and public relations will be provided by the appropriate P.I.E. departments on a reimbursement basis.

At the larger points, air freight forwarding will be conducted separately from the P.I.E. common carrier operation. Separate terminals at or near airports will be devoted to air freight, and separate air freight drivers, pickup and delivery trucks, salesmen, etc., will be maintained, although even in high density points, P.I.E.'s motor carrier facilities and personnel will also be available for the PAFF operation.

Initially, PAFF will operate at airport terminals in 14 major cities and have driver salemen equipped with radio dispatched pickup and delivery equipment. At each of 16 additional points, PAFF will employ one driver salesman who will be headquartered at the P.I.E. truck terminal but will be engaged exclusively in picking up and delivering PAFF shipments.

P.I.E. has 1,338 pickup and delivery vehicles located at numerous points on its system, and will add 46 units immediately for air freight forwarding. To cities which cannot initially support a separate air freight operation, PAFF will offer air freight forwarding service through the use of P.I.E.'s surface common carrier facilities and personnel. At each P.I.E. station, personnel will be trained to handle pickup and delivery and to provide information about air freight forwarding. All of P.I.E.'s 131 salesmen will be trained to solicit air freight forwarding traffic as well as surface traffic.

P.I.E. will accept shipments at off-airline points and transport them by P.I.E. motor truck to the nearest appropriate airline city, at which point the shipment will be turned over to PAFF. PAFF will offer a variety of pickup and delivery services. In some areas air freight will be picked up on the same equipment with surface freight and tailgate-loaded for easy platform handling and transloading to a shuttle truck for the airport. In other instances, the air shipments will be off-loaded at a drop station where they will be picked up by an airport shuttle. And in other instances, air freight pickup trucks will go directly to the airport or airport terminal.

PAFF initially will charge rates comparable to those now charged by existing air freight forwarders but it will lower these rates if the increased volume of traffic and the lower cost jet capacity justify it.

PAFF estimates that in its first year it will receive total revenues of $4,211,000 and incur expenses of $4,307,000 for an operating loss of $96,000. However, in the second year, it is anticipated that revenues will increase to approximately $6 ½ million which, after expenses of about $6 million, will result in a profit before taxes of $500,000.

CONCLUSION

The immediate issue is whether the four applicants should be authorized to operate as air freight forwarders, but the Board, in instituting this proceeding, stated that the fundamental question is whether long-haul motor carriers of general commodities should be allowed to act as air freight forwarders. Consequently, it commenced a broad investigation to afford all interested persons an opportunity to fully explore this question.[8]

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[8] Order E-23117, January 12, 1966.

Pervading the arguments and briefs of the opponents is the complaint that the air freight forwarding industry is over-competitive and that the entry of large well-financed organizations such as the applicants would be unfair competition for the small air freight forwarders.

This argument would be relevant to the question whether free entry is to be permitted into the air freight forwarding industry. But that question is not one of the issues here. The Board with certain exceptions has historically permitted free entry into the air freight forwarding industry and size, strength, or financial resources have never been considered a disqualification.

The question here is only whether the applicants' affiliations with surface carriers should bar them from air freight forwarding. In deciding this question, the above factors are relevant but only to the extent that such factors in combination with surface carrier affiliation will affect the public interest.

The Board has considered the desirability of authorizing surface carriers to engage in air freight forwarding. In some cases, it has denied such authority,[9] in some cases it has granted it,[10] and in other cases it has authorized such entry subject to certain restrictions and limitations.[11] The parties have analyzed these decisions in an attempt to determine Board policy with reference to authorizing direct surface carriers to operate as air freight forwarders with the applicants, as expected, arguing that Board policy favors free entry into air freight forwarding and the air freight forwarders, the direct air carriers, and the Bureau finding that the Board's policy, with limited exceptions, is to exclude direct surface carriers.

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9 Air Freight Forwarder Case, 9 C.A.B. 493, 509-512, 513 (1948).

10 Air Freight Forwarder Investigation, 21 C.A.B. 536, 544-546, 565 (1955).

11 Air Freight Forwarder Authority Case, E-21056, (July 10, 1964).

Such an attempt to determine the Board's historical policy might be fruitful if the Board had not specifically stated that this proceeding was to embrace a thorough reexamination of this question on the basis of the present factual situation.[12] Consequently, it is clear that the Board wishes to determine that policy most in the public interest now and in the immediate future, and to discard policy factors based on factual situations that no longer exist.

The Board expressed its interest that certain matters be investigated in this proceeding as follows:

> "* * * We are concerned with the impact, if any, upon the existing air freight forwarders of permitting the applicants and any similarly situated companies to become air freight forwarders. To make such an evaluation, it is essential that the record contain a detailed analysis of the present posture of the air freight forwarder industry. Further, attention should be focused upon the conflicts of interest, if any, arising out of a situation where the same company or system provides both line-haul and air freight forwarding service. The parties should also address themselves to the question of the impact upon direct air carriers of entry into the field of motor carrier/air freight forwarders. Finally, we assume the applicants, as part of their presentations, will submit evidence showing what contributions, if any, they are equipped to make to the promotion and development of air transportation, and how the public interest will be served by Board approval of the applications."[13]

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12 Order E-23117, January 12, 1966.

13 Order E-23117, p. 3, January 12, 1966.

Although the Board stated specifically that the issues are not limited to those set forth in its order, those matters must be disposed of before reaching a decision on the applications.

Contributions to the Promotion and Development of Air Transportation and Service to the Public

Each of the applicants is a large long-haul motor carrier of general commodities with extensive route systems covering a substantial part of the nation. As such, each has an extensive organization experienced in the transportation of comparatively small parcels and each has submitted a detailed plan for air freight forwarder operations. CF plans to set up a separate organization to handle its air freight forwarding activities while the other three applicants plan more coordination with their existing surface carriage.

The principal contributions which the applicants believe they can make to the public interest are as follows:

They contend that the use of their existing organizations for preparing bills, reports, and accounts will facilitate efficient service; that, by establishing connections between their motor carrier points and airline points, they will provide shippers with direct transportation from origin to destination together with single carrier responsibility; that congestion at a shipper's loading platforms will be minimized and shipping facilitated if both surface and air transportation services are provided by the same company and sometimes by the same trucks;[14] and that their well-financed national organizations experienced in the transportation of small parcels will provide superior air freight forwarding services.

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[14] This does not apply to CF which generally plans an autonomous air freight forwarding division.

Common Use of Billing, Accounting, and Reporting Procedures and Facilities. Use of the sophisticated accounting, billing, and reporting systems which only a large organization can afford should assist the applicants in providing a convenient service to the public. The large independent air freight forwarders can provide similar services but the smaller forwarders will have more difficulty in this matter.

Single-Carrier Service. Although the applicants may, in some instances, provide single-company responsibility with reference to tracing lost or mislaid shipments or processing claims, the public benefit will be minimal. First, most of the air cargo travels between major airline points for which the independent air freight forwarder can provide single-carrier responsibility. Second, a substantial part of the traffic for points beyond airline terminals will travel by interline connections with surface carriers other than the applicant's affiliate, either because the applicant's affiliate is not authorized to provide the surface transportation or because a convenient connection with the affiliate's schedule is not available. Third, in those instances in which a motor carrier-air freight forwarder can provide connecting service between its surface and air operations, the only advantage of single-carrier responsibility will be with reference to the surface portion of the trip. If the delay, loss, or damage occurs during air transportation, the independent air freight forwarder can trace the parcel or check the claim as easily as the motor carrier-air freight forwarder.

Similarly, the provision of one-carrier connecting service will not substantially expedite the delivery of air cargo. For the reasons above stated, only a very small portion of the air cargo generated by a motor carrier-air freight forwarder will also travel over its surface affiliate's system. In those cases in which it does, it will still be only a connecting service requiring transhipment in most cases.

Furthermore, direct service using both air and surface facilities under one through-weighbill is now available pursuant to 1003(b) truck-air agreements.

Elimination of Congestion at Shippers' Terminals. Although the applicants contend that the use of one organization to pick up and deliver both airline and motor carrier traffic will relieve congestion at the shipper's docks, an analysis of the situation discloses no substantial improvement will result. Whenever the motor carrier-air freight forwarder uses separate trucks to pick up and deliver air cargo, congestion will not be affected. It will merely substitute the same number of trucks of one carrier for those of different carriers. Furthermore, frequently the optimum times for shipping air cargo and surface cargo do not coincide. In such situations the congestion problem is minimized. In some cases, the applicants propose to tailgate parcels to the airport on trucks loaded with surface freight. This may relieve congestion at the shipper's docks but use of line-haul equipment for airport delivery will increase congestion at the airport.

Additional Air Freight Forwarding Services. Although air freight forwarding operations as previously described are substantially different in many characteristics from the operations of the long-haul motor carriers, both involve the long-haul transportation of parcels of similar sizes and weights including pickup and delivery service, tracing of lost or mislaid articles, preparing similar types of documents, etc. The applicants are large, well-financed, profitable organizations experienced in this type of business. They will make available to the public substantial additional air freight forwarding facilities and they plan the intensive promotion of air freight.

The Board has said in discussing the entry of two railroad controlled organizations into air freight forwarding that:

> "* * * In the cases of these two applicants, we also note that the introduction into airfreight forwarding of organizations having extensive experience and facilities in the field of surface freight may result in the adaptation and introduction into airfreight of practices or techniques which contribute to the attractiveness of the service or the efficiency with which it can be rendered."[15]

Although the contribution of the applicants by providing single-carrier service not now available and by eliminating congestion of the shipper's facilities will not be substantial, the applicants, by providing sophisticated management, personnel, and equipment and devoting their well-financed experienced organizations to the generation and transportation of cargo by air, will contribute a substantial benefit to the public.

Impact Upon Existing Air Freight Forwarders

If the applicants as air freight forwarders operate with the zeal indicated in their testimony, they will generate a substantial volume of air cargo which will include some diversion from the existing air freight forwarders. Some of this diversion will initially result from the apparent advantage in having the same carrier handle both air and surface freight movements, (as indicated previously, this advantage is more apparent than real.) Such diversion will not be substantial or long lasting. Almost every shipper witness testified that some of his air cargo would be diverted to the air forwarding services of the applicant which had called him to the stand. Most of these witnesses, however, implied that this diversion would be because of unsatisfactory existing forwarding services or to test the new services with

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15 Airfreight Forwarder Investigation, 21 C.A.B. 536, 546 (1955).

a portion of their air shipments. None stated that they would transfer a substantial volume of traffic from air freight forwarders who were meeting their air shipping needs.

Air freight forwarders who are providing satisfactory service will lose little traffic to the motor carrier-air freight forwarders. If the applicants are to be successful, they will have to rely on newly generated traffic. The market potential is large enough, if developed, to support the existing forwarders, the applicants, and a substantial number of additional forwarders which may be authorized in the future.

The strong and efficient forwarders with their established businesses and trained organizations will suffer only minor losses with the entry of the applicants into competition. On the other hand, the demise of some of the weaker air freight forwarders may be hastened by the competition provided by the applicants. In the long run, although some of the air freight forwarders may be initially injured, the air freight forwarder industry will be strengthened by the addition of strong forwarders, such as the applicants. Some of the benefits from the applicant's promotion of air freight will spill over to the benefit of the industry generally.

Conflict of Interest

The Bureau, the air freight forwarders, and the airline intervenors contend that the authorization of the same person to engage in long-haul motor carriage of general commodities and air freight forwarding will result in conflicts of interest which will be detrimental to the public. It is argued that the long-haul motor carrier will use its air freight forwarding authority to promote surface transportation rather than air transportation with the result

that (1) newly developed traffic will travel by surface rather than air and (2) traffic now traveling by air will be diverted to surface transportation. It is claimed that inasmuch as motor carriers (the applicants) (1) are more familiar, experienced, and qualified in motor surface carriage than in air freight forwarding, (2) have substantially heavier investments in operating equipment than will be necessary for air freight forwarding, and (3) inasmuch as motor trucking is much more profitable than air freight forwarding, both on return-on-investment and operating-ratio bases, the economic interests of the applicants will dictate that the utmost effort be devoted to converting the maximum volume of traffic to surface transportation and to inhibiting the use of air.

This argument is based on two incorrect assumptions; first, that the motor carrier industry will obtain such a control of the air freight forwarding and the air-cargo industries that it can dictate the mode of transportation to be used. For reasons set forth herein in the discussion of the impact on the direct air carriers, there is no reasonable possibility that this could happen in the foreseeable future. Second, it assumes that the applicants, if they become air freight forwarders, can choose the mode of transportation for the cargo they generate.

Given the choice, the motor carriers would, no doubt, prefer to carry all cargo by surface means. But that choice is not available. Air-cargo transportation has developed to such an extent and its potential benefits are so obvious for a substantial part of the materials now moving in commerce that the motor carriers cannot prevent its use. If the motor carriers could retain the cargo they are now carrying and divert cargo from air to surface, they would not be wasting their time and money setting up and operating as air freight forwarders.[16]

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[16] Airfreight Forwarder Investigation, 21 C.A.B. 536, 546, 621 (1955).

The realistic choice of the applicants is between staying entirely in the motor carrier business and fighting to obtain the maximum share of cargo for their surface operations or to supplement their surface carrier income with air freight forwarding revenues. Even though air freight forwarding may not be as profitable as motor carriage, it is more economical to obtain some of this less profitable traffic than to lose it all. The motor carriers realize a tremendous expansion in the use of air-cargo transportation is inevitable. They want to participate in it.

The air freight forwarders contend that in the short-haul market, surface transportation is very competitive with air service and that, consequently, the motor carrier-air freight forwarders will divert this traffic to surface carriage at substantially lower rates. They contend that this traffic represents a substantial portion of the present air-cargo market and that its loss will have serious economic impact upon the air freight forwarders and the direct carriers.

The adjuration of the Congress to the Board set forth in section 102(b) of the Act to promote air transportation does not mean that air transportation should be developed at the expense of other forms of transportation. The recent establishment of the Department of Transportation demonstrates that it is the Congressional intent that all be coordinated. The sound development of our economy requires that the purchaser and user of transport services determine which mode provides the best service to him in terms of price and speed. The Act indicates no intent to arbitrarily disturb the inherent advantages of any transportation mode. Rather, the inherent advantages of each mode should be fostered and the free and unencumbered movement of intermodal traffic must be facilitated.[17]

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[17] Address of Robert T. Murphy, Vice Chairman, C.A.B., Mayflower Hotel, Washington, D. C., February 24, 1967.

Transportation is a volatile industry and the transportation needs of the shippers are subject to change constantly depending on comparative costs, speeds, and many other factors. As airline operating costs come down, more cargo will move by air; as the surface carriers develop more expedited service, air cargo will shift back to surface transport. In many cases, a combination of air and surface transportation may provide service cheaper than air and faster than surface and meet the shipper's primary needs in both respects.

Although in some circumstances for short periods of time an energetic and clever promotor may be able to persuade shippers to use modes of transportation adverse to their economic interests, in the long run, the shipper will choose that form of transportation which best meets his needs. If the motor carrier-air freight forwarders do not inform the shippers those situations in which air transportation is preferable, tne independent air freight forwarders and/or the airlines will. The leading independent air freight forwarders and airlines have demonstrated sufficient imaginative, energetic, and zealous interest in promoting air freight to assure that the shippers will be advised of the benefits of air transportation. If the motor carrier-air freight forwarders don't do likewise, the independent forwarders will have nothing to fear.

There, of course, will be areas in which neither surface nor air transportation offers substantial benefits over the other. In such cases, it is immaterial to the public which mode is used. In any event, if the motor carrier has access to such traffic, it is more likely to go by air if the motor carrier is also a forwarder which can handle the air transportation.

It is also contended that in certain other aspects, a motor carrier-air freight forwarder will be subject to conflicting interests which will prevent the maximum development of air freight forwarding. For example, in some cities

efforts are being made to extend the limits of the terminal areas to which air freight forwarders can provide pick-up and delivery service. These efforts are being resisted by motor carriers who fear the loss of some short-haul markets. It is argued that an air freight forwarder dominated by a motor carrier might not be zealous in pressing for expanded terminal areas.

This possibility is unlikely to have adverse implications for the public. First, the independent air freight forwarder should be able to present sufficient facts in support of expansion of an air terminal area to enable the responsible agency to reach an equitable decision. Second, authorization of the applicants to act as air freight forwarders should minify their objections to the extension of air freight forwarder terminal areas.

With healthy air freight forwarder and airline industries, no conflicts of interest adverse to the public will develop from the authorization of motor carriers to act as air freight forwarders.

Impact on Direct Air Carriers

The Bureau and air carrier parties contend that the entry of motor carriers into the air freight forwarder business will have an adverse effect on the direct air carriers. The jist of this argument is as follows:

The motor carrier-air freight forwarders, because of their large well-financed organizations and favorable relationships with the shippers created by their surface carrier affiliates, will be able to destroy or weaken the independent forwarders to such an extent that they can control the air freight forwarding business. As such dominant forwarders, they can arbitrarily pick whichever air carrier suits their interest. Having such strong positions, they will dictate air-cargo rates to the direct air carriers and compel other favorable action by the airlines and thereby lessen competition with surface carriage and artificially interfere with the normal development of air-cargo service.

This argument is based on assumptions not in accord with the facts of present day air transportation. The total interstate direct air cargo amounted to734,570 tons in 1964 of which 163,115 tons, or 22.2 percent, were

generated by air freight forwarders. The top ten air freight forwarders earned net air freight forwarding profits of $7,168,424 on total assets of $24,119,317 and total proprietary capital of $8,995,779.

With the airlines and the independent air freight forwarders each participating to such an extent in air-cargo transportation they, at present, are in an impregnable position. Second, if their existence were threatened, they would, of course, cooperate with motor carriers not affiliated with air freight forwarders to resist competition from the motor carrier-air freight forwarders. Third, the applicants are motor carriers who will be competitive with each other for air and surface cargo. There are no indications they would try to combine to control the air-cargo industry. Fourth, the Board has ample powers under the Act to prevent unfair competitive practices in restraint of trade which it can use if the motor carrier-air freight forwarders attempt to obtain control of either the air freight forwarders or the direct air carriers, or both. Fifth, the Board can, as it has in the past, limit the duration of the air freight forwarding authorizations for an experimental period to test the effect upon the public interest.

The strong position of the independent airlines and the independent air freight forwarders, the competitive status of the applicants, among themselves and with other surface carriers, and the Board's authority to prevent unfair competition and to review the authorizations after a reasonable operating period are sufficient to insure that the applicants and others similarly situated will not be able to dominate air-cargo transportation or to slow its growth and development.

Unfair Competitive Practices and Illegal Activities

It is contended that the status of the applicants as long-haul motor carriers and as air freight forwarders will enable them to engage in unfair competitive practices and

other illegal activities difficult to detect which will be prejudicial and injurious to the independent air freight forwarders. For example, the air freight forwarders argue that the law prohibits air freight forwarders from making through-service agreements with motor carriers providing for joint rates, while under section 1003(b) of the Act, the motor carriers can make such agreements with the airlines. This would permit the applicants to quote two rates to the public for the same service, i.e., a joint 1003(b) rate and an air freight forwarder rate, while the independent air freight forwarder would be limited to the latter. Under such circumstances, the motor carrier-air freight forwarder could quote a lower through rate with which the independent air freight forwarders could not compete.

There are several other allegations of ways in which a motor carrier-air freight forwarder could unfairly compete with the independent air freight forwarder. For example, the motor carrier-air freight forwarder can also have surface freight forwarding authority and quote two rates for the same surface portion of the transportation while the independent air freight forwarder would have only one rate.

These contentions are unpersuasive. First, the competing motor carriers, direct air carriers, and independent air freight forwarders can be relied on in their self-interest to resist such actions by the motor carrier-air freight forwarders;[18] second, the motor carrier-air freight forwarders as competitors among themselves will resist efforts of each other to obtain controlling positions; third, the Board pursuant to its powers to require reasonable, non-discriminatory, non-preferential, and non-prejudicial rates and its power to prevent unfair competition will be able to prevent the harmful practices which the air freight forwarders

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[18] Airfreight Forwarder Investigation, 21 C.A.B. 536, 545 (1955).

and the direct air carriers fear;[19] fourth, there is nothing in this record to indicate an intent or propensity of any of the applicants to engage in such activities; and, fifth, the Board can, as it did when it originally authorized air freight forwarding[20] and when it authorized two railroad controlled organizations to engage in air freight forwarding,[21] limit the term for which such authorizations are effective. It can thereby observe whether any of the motor carrier-air freight forwarders engage in any of the practices which the air freight forwarders and the direct air carriers fear.

Legality

The air freight forwarders contend that the Board is without statutory authority to authorize motor carriers to engage in air freight forwarding. They contend that the applicants whether applying in their own right for air freight forwarding authority or for approval of control of air freight forwarders or for approval of interlocking relationships with air freight forwarders, must meet the requirements of sections 408 and 409 of the Act. Section 408(b) provides, *inter alia*, that it shall be unlawful for a common carrier to acquire control of an air carrier unless approved by the Board. In determining this question the Board, after hearing, shall approve the acquisition unless it finds it will not be consistent with the public interest or that the conditions of section 408 will not be fulfilled. The Board shall not approve such acquisition which will result in creating a monopoly or monopolies or jeopardize another air carrier.

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19 Air Freight Forwarder Case, 9 C.A.B. 473, 494, 496 (1948); Air Freight Forwarder Case (International) 11 C.A.B. 182, 190 (1949).

20 Air Freight Forwarder Case, *supra* note 19, at 498.

21 Airfreight Forwarder Investigation, *supra*, note 18, at 544.

Section 409 provides, *inter alia,* that it shall be unlawful unless approved by the Board upon due showing that the public interest will not be adversely affected thereby for any air carrier to have an officer or director who is an officer, director, or member, or a controlling stockholder in a common carrier.

For purposes of this decision; it is assumed that these sections are applicable to the applications at issue herein. However, there is nothing in the Act that automatically disqualifies common carriers other than air carriers from acting as air freight forwarders. The Board has held that railroads may control an air freight forwarder.[22]

Furthermore, the second proviso of section 408(b), which requires that if the acquiring carrier is not an air carrier the acquisition shall not be approved unless the transaction will promote the public interest by enabling such carrier to use aircraft in its operations and will not restrain competition, is not applicable to the acquisition of air freight forwarders.[23]

The previous discussion demonstrates that it will be consistent with the public interest to approve the applications herein, and that approval of the applications is consistent with the Board's policy of free competitive entry into air freight forwarding.

The interlocking relationships involved are those between the air freight forwarding entities and the common carriers which control them, and are mere incidents of such control relationships. As such control relationships will not be adverse to the public interest, neither will the incidental interlocking relationships.

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[22] Airfreight Forwarder Investigation, *supra* note 18, at 544-546.

[23] Air Freight Forwarder Case, *supra* note 19, at 503.

National Air Freight Forwarding Corporation

P.I.E., through its subsidiary PAFF, is applying only for domestic air freight forwarding authority. For international air freight forwarding it asks approval of the acquisition of National Air Freight Forwarding Corporation, (NAF), an international forwarder.

NAF is a dormant company with practically no assets or liabilities. Its relationship with P.I.E. is similar to that of PAFF and the same considerations apply. Its acquisition by P.I.E. should be approved.

National City Lines, Inc.

Approximately 33 percent of the stock of D. C. is owned by National City Lines, Inc., a holding company with substantial investments in other motor carriers, including sole ownership of two interstate carriers of substantial size, Automobile Carriers, Inc., and Los Angeles-Seattle Motor Express, Inc. Automobile Carriers holds extensive Interstate Commerce Commission authority to transport automobiles from Michigan to points throughout the nation. National City Lines, Inc., has an investment of more than $5 million in Automobile Carriers. Los Angeles-Seattle Motor Express, Inc., has Interstate Commerce Commission authority to transport general commodities in the Los Angeles-Seattle area. National City Line's investment is about $3.7 million.

No application has been filed requesting approval of control of D. C. by National City Lines, Inc., and on this record it is impossible to determine if National City Lines, Inc., does control the applicant. However, National City Lines, Inc., is a common carrier and the same factors should be considered in authorizing an organization controlled by a common carrier to engage in air freight forwarding as would be considered in an application of a common carrier for approval of the acquisition of an air freight forwarder.

The common carrier activites of National City Lines, Inc., and D. C. are similar in nature and extent to such activities of the other applicants and the same considerations apply. For reasons hereinbefore stated with reference to the common carrier affiliations of all the applicants, D. C.'s relationship with National City Lines, Inc., whether or not it is controlled by that organization, should not disqualify it from receiving air freight forwarding authority.

Duration of Authority

The Board, when it originally authorized air freight forwarding,[24] when it authorized two railroad controlled air freight forwarders,[25] and when it authorized motor carriers of household goods to engage in air freight forwarding of household goods,[26] limited such authorizations to an experimental period of five years. This limitation was to permit a check on the newly authorized services after a reasonable trial period. For the same reason, the authorizations granted here should be for the same five year experimental period. Inasmuch as NAF has an international air freight forwarding authorization of indefinite duration, this experimental period will be maintained by making the approval of control of that corporation by P.I.E. subject to a five year limitation.

Summary of Conclusions

In view of the foregoing discussion and all the facts of record, it is concluded:

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[24] Air Freight Forwarder Case, *supra* note 19, at 498.

[25] Airfreight Forwarder Investigation, *supra* note 18, at 622.

[26] Air Freight Forwarder Authority Case, Docket 12193 *et al.*, E-21056, July 10, 1954.

1. That the public interest requires that CF Air Freight, Inc., Navajo Freight Lines, Inc., and D. C. International, Inc., be authorized to perform air transportation as domestic and international air freight forwarders for an experimental period of five years;

2. That the public interest requires that P.I.E. Air Freight Forwarding, Inc., be authorized to perform air transportation as a domestic air freight forwarder for an experimental period of five years;

3. That CF Air Freight, Inc., Navajo Freight Lines, Inc., D. C. International, Inc., and P.I.E. Air Freight Forwarding, Inc., are fit willing and able to conform to the provisions of the Federal Aviation Act and the Board's rules and regulations thereunder;

4. That control of CF Air Freight, Inc., by Consolidated Freightways, Inc., should be approved;

5. That control of P.I.E. Air Freight Forwarding, Inc., by Pacific Intermountain Express Co., should be approved;

6. That control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., should be approved for a period of five years;

7. That the interlocking relationships between the officers and directors of Consolidated Freightways, Inc., and CF Air Freight, Inc., should be approved;

8. That the interlocking relationships between the officers and directors of Pacific Intermountain Express Co., and P.I.E. Air Freight Forwarding, Inc., should be approved;

9. That the interlocking relationships between the officers and directors of Pacific Intermountain Express Co., and National Air Freight Forwarding Corporation, should be approved;

10. That approval of said common control and interlocking relationships shall be subject to the provisions of part 251 of the Board's Economic Regulations now in effect and as hereafter amended; and

11. That the Board retain jurisdiction over this proceeding for the purpose of reviewing at any time the approvals granted herein and/or imposing at any time with or without hearing such other conditions as the Board may find just and reasonable.

An appropriate order is attached.

/s/ Merritt Ruhlen
Hearing Examiner

April 17, 1967

Air Freight Forwarders
Profit and Loss
Calendar Years 1961 through 1965 and Six Months Ended June 30, 1966

Freight	Calendar Year 1961		Calendar Year 1962		Calendar Year 1963		Calendar Year 1964		Calendar Year 1965		Six Months Ended June 30, 1966	
Forwarder[1]	Overall[2]	Airfreight[3]	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight
AAA	(3,069)	(3,069)	2,366	2,366	5,126	5,127	14,725	14,725	13,912	13,912	20,191	20,191
ABC	153,122	153,122	102,710	102,710	(182,530)	(192,310)	(174,761)	(180,052)	(73,477)	(74,118)	(134,663)	(134,663)
ABBOTT	(1,926)	(3,026)	945	1,407	12,882	7,698	9,735	10,152	5,388	5,388	5,665	5,665
ACE									525	–	8,028	–
ACME	17,604	21,783	(5,065)	6,387	(14,192)	(3,150)	(11,224)	10,955	9,201	5,664	1,797	5,094
ACTIVE							10,829	4,936	38,267	70,163	6,162	9,190
ADD	(63,838)	(61,621)	(26,122)	(31,567)	51,842	45,616	35,456	36,043	155,932	165,121	8,470	4,235
AERO-EX			(16,113)		182		(17,986)	16	13,748	19	9,667	3
AERO-F			1,829	(11,987)	4,698	(513)	17,751	11,137	9,551	9,333	3,265	3,557
AERO-SF												
ACC	(61,672)	(87,707)	2,190	(13,198)								
ACD	17,009		3,316		3,242							
ACS									(5,076)	12,105	4,403	28,810
ACT	9,495	9,495	6,927	6,927	9,527	9,527	12,153	12,153	14,344	14,344	11,984	11,984
AIR-DIS	(65,397)	(65,822)	(91,249)	(91,248)	10,906	10,906	(228,608)	(113,379)	63,678	63,678	35,667	35,667
AIR-EX	25,784	(117,919)	39,591	10,777	23,584	16,603	36,684	26,657	24,377	29,380	20,598	18,316
AEI	86,388	28,696	8,202	44,611	127,898	88,677	331,285	217,641	8,927	(58,861)	(54,916)	(961,956)
AF							3,703	3,703	13,843	13,843	8,731	8,731
AFD			219,052	(5)	88,131	9	190,898	15	739,933	39	690,689	39
AFS	(22,656)	(17,171)	(27,086)	(20,066)								
AFC					(10,667)	(10,667)	(231)	(231)	(381)	217	(484)	(484)
AIR-LAND	(559f	(6,374)	(17,412)	(9,048)	(20,904)	(30,945)	5,066	(481)	11,614	3,384	54,309	(5,940)
AIR-LANES	39	39	56	56	108	108	124	124	5	5	872	872
AIR-OVER												

[1] Full names of air freight forwarders set forth in this appendix on page 22.

[2] Results from all operations before taxes.

[3] Results from air freight forwarding operations only.

Air Freight Forwarders
Profit and Loss
Calendar Years 1961 through 1965 and Six Months Ended June 30, 1966

Freight Forwarder[1]	Calendar Year 1961		Calendar Year 1962		Calendar Year 1963		Calendar Year 1964		Calendar 1965		Six Months Ended June 30, 1966	
	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight
AIR-SEA	2,117	1,936	514	738	573	(5,893)	5,493	(221)	5,269	(7,247)	6,416	121
AIRBORNE	633,723	490,028	155,961	106,143	180,384	77,192	426,259	28,125	326,156	104,225	76,402	115,448
AIRSEMBLY	(279)		(237)		(454)		(1,569)	(144)	(2,194)	(338)	(373)	(10)
ALAS	3,522	3,533	(4,362)	(4,362)	(911)	19,575	2,794	3,463	1,756	2,606	92	110
ALASKA					160	(20,936)	6,250	(13,067)	(1,177)	3,892	2,520	46,087
AIRWAYS	17,338	16,911	18,789	17,110	3,452	2,597	7,918	7,918	22,673	16,161	12,383	(930)
AAT	167	167	22,055	22,055	12,052	12,053	7,418	10,173	9,500	9,500	3,500	0
AAFI	(47,989)	(117,808)	(63,689)	(132,238)	(40,439)	(99,684)						
ALLIED	4,336	4,336	(40,797)	(40,797)	(28,426)	(28,426)						
ALLSTATES			9,849	9,849	25,556	23,855	18,013	15,412	25,706	20,547	14,971	12,947
AAC	(3,906)	(3,205)	(46,601)	25,217	(16,575)	92,734	(8,979)	106,213	71,584	152,623	4,400	83,595
AEC	5,178,701	(79,619)	6,738,761	(80,337)	11,975,724	(153,050)	21,183,155	57,244	24,333,132	121,535	14,526,478	(668,160)
AEL												
AAI	837				7,319	(21,610)	6,212	(58,919)	18,424	(64,124)	(9,274)	34,368
APEX							(2,126)	(1,668)	(3,598)	(12,932)	808	(5,272)
AAF	7,273	6,065	(10,580)	(11,329)	32,320	30,919	31,385	29,404	52,262	49,202	20,874	18,737
BADER											No Operations	
BARNETT	6,127	6,127	4,911	4,911	(766)	(766)	6,938	6,938	4,688	4,688	2,946	2,946
BIA	(2,673)	(2,673)	1,866	1,867	442	443	435	435	893	893	342	342
BAR-SAN					(397)	37	(506)		(245)			
BEACON											14,746	1,152
BEHRING												
BEKINS									577	577	(234)	(234)
BERNACKI	(47,216)	(97,991)	(1,285)	(106,356)	19,614	(87,289)	92,248	(35,588)	(13,055)	(142,522)	2,748	(80,769)

[1] Full names of air freight forwarders set forth in this appendix on page 22.

Air Freight Forwarders
Profit and Loss
Calendar Year 1961 through 1965 and Six Months Ended June 30, 1966

Freight Forwarder[1]	Calendar Year 1961		Calendar Year 1962		Calendar Year 1963		Calendar Year 1964		Calendar Year 1965		Six Months Ended June 30, 1966	
	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight
BOR-AIR	38,224	21,910	41,061	25,000	30,292	13,975	10,877	(8,057)	6,291	(15,294)	4,665	(4,920)
BRAKE					(6,126)	7	57,161	572	15,462	38	32,091	1,499
BRUCE												
BYRNES	12,399	8,308	1,523	5,082	11,373	1,271	11,905	8,736	21,734	33,510	80,532	26,562
CAL-AIR					(1,336)	(1,819)	19,030	18,524	24,920	22,772	3,095	2,222
CAMPBELL	(156)		355	(623)								
CAPITAL							(32,791)	(32,791)	(3,426)	(3,426)		
CARTWRIGHT											11,607	
CHICAGO	none		(138)	(138)	(368)	(368)	(517)	(517)	(135)	(135)	(32)	(32)
CIRCLE	666	666	8,448	8,610	14,438	6,127	28,336	(34,423)	24,973	(78,415)	(33,656)	(70,613)
CITY	(15,387)	(15,387)										
CLEVELAND							No Activity		none		none	
CEP									258,874	(19,258)	7,043	(39,073)
CAFF											4,416	4,416
CAFI							4,153	1,842	1,574	1,181	850	(1,030)
CAF	(1,114)	(1,134)	(5,986)	3,944	(1,153)	(1,153)	none		none			
CFI											(11,249)	
CSI			25,705	(220,899)	(22,840)	(229,701)	44,190	(298,134)	14,625	9,437	45,297	1,778
D. C.	47,957											
DEAN											145,000	(47,800)
DAF							(3,078)	(3,632)	4,813	4,813	3,061	3,061
DAE	(17,086)	(17,086)	(21,472)	(21,472)	(6,042)	(6,042)	72,096	66,434	140,799	176,865	88,165	88,165
DORF	4,073		595	1,555								
DOW	11,684	(2,061)	4,658	1,540	16,548	1,141	65,418	2,735	121,651	5,724	71,706	3,803

[1] Full names of air freight forwarders set forth in this appendix on page 22.

Air Freight Forwarders
Profit and Loss
Calendar Year 1961 through 1965 and Six Months Ended June 30, 1966

Freight Forwarder[1]	Calendar Year 1961		Calendar Year 1962		Calendar Year 1963		Calendar Year 1964		Calendar Year 1965		Six Months Ended June 30, 1966	
	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight
EAGLE									6,810	6,810	(3,738)	(3,738)
EAF	2,221,546	2,182,240	2,367,769	2,299,920	2,801,285	2,716,897	3,705,843	3,787,994	5,260,046	5,464,458	3,137,960	3,050,376
ENTICO			101,859		326,475		341,467				80,758	
EFA	(566)	375	(495)	(495)	(211)	(211)	291	291	(728)	(728)	594	594
ENGEL									45,956		72,224	
EXPRESS			2,834	2,808	948	(5,313)	(4,696)	(13,075)	(24,215)	(37,611)	(90,893)	(102,078)
AERO-TRANS	5,872		(27,233)									
FALCON			5,013	23,820	(14,287)	(14,287)						
FLETE	5,355	62	2,978		(3,856)							
FLYING	7,032	2,588	21,013	23,563	38,983	(167,683)	(5,128)	(384,298)	(7,248)	(598,576)	(22,649)	
FMS					9,946	20,708	21,182	59,910	25,305	167,479	10,275	90,256
RENNIE											3,461	103
FSS	5,902	13	11,986	2,767	(4,101)	(248,043)	11,665	(945)	4,515	2,037	11,398	2,700
4-A	(10,260)	(10,379)	(28,078)	(28,078)	1,384	1,384	15,010	15,010	57,973	57,973	19,373	19,373
FREESLATE[2]	55,484		7,254	457	9,480	1,783	32,106	(27,594)	49,341	570	1,455	3,230
GAF	(24,914)	(24,914)	(31,855)	(33,231)	10,726	5,010	4,744	2,556	(66,945)	(71,622)		
GAT	(467)	(60)	(307)		(144)		(423)	13	(130)	13	(8)	
GAC	31,983	(6,461)	29,075	11,409	6,661	(57,992)	26,839	(47,331)	14,913	(356,173)	9,955	9,955
GVL									664,680	1,860	146,967	2,668
GSC	36,324		6,717	2,532	18,183	8,084	33,504	16,891	33,095	15,647	26,112	3,581
LeMARK			9,249	9,248	12,189	12,189	6,564	6,563	8,036	8,036	6,033	6,033
HARLE												
HBL	3,144	(22,965)	(13,939)	(10,371)	(3,104)	1,229	(11,832)	(4,528)	(17,444)	(9,394)	(2,394)	12,700
HAF					(1,337)	(310)	3,011	(1,598)	(1,438)	(3,360)	1,264	245

[1] Full names of air freight forwarders set forth in this appendix on page 22.

[2] Freedman and Slater until 10/25/63.

Air Freight Forwarders
Profit and Loss
Calendar Years 1961 through 1965 and Six Months Ended June 30, 1966

Freight Forwarder[1]	Calendar Year 1961		Calendar Year 1962		Calendar Year 1963		Calendar Year 1964		Calendar Year 1965		Six Months Ended June 30, 1966	
	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfrieght
HOP	4,053	4,053	202	202	1,777	1,776	10,851	10,852	12,452	12,452	6,909	6,909
IAF	10,678	7,919	(24,859)	(38,490)	42,831	35,878	(17,704)	(18,574)	74,747	87,020	(21,409)	(23,205)
IMF	(1,952)		29,764	4,547	29,932	5,097	31,116	4,148	46,102	(237,654)	15,120	271,423
ICS	18,163	(3,831)	10,106	761	1,236	(1,892)	26,781	5,601	22,245	12,317	4,895	(7,409)
											7,150	(745)
IST	927											
IMS	869	(23,208)	1,712	(26,104)	2,107	(26,544)	137,512	(17,916)	23,838	(44,829)	32,694	(26,471)
JET									88,021	904	12,664	829
JAF	18,896	162,761	37,465	259,969	53,807	299,020	106,211	(361,004)	86,448	(433,447)	58,765	(235,577)
JES			3,530	3,530	17,563	89,626	20,987	22,695	3,537	6,461	936	1,087
KEC			none		No Activity		13,801	(1,921)	14,445	(1,669)	none	
KEY												
BERKLAY											505	7,973
LOOMIS											(9,519)	(848)
MARK IV									4,872	4,872	(7,918)	(21,954)
MAF											(2,009)	(2,009)
MEYER									752	752	4,470	4,470
MURRAY							(192)	(333)	8,201	8,528	4,324	4,324
NAF	2,853	(14,054)	(57)		No Activity		No Activity		No Activity		No Activity	
NMC									No Activity		20,542	
NPPS			(84,266)	(84,419)	(15,120)	(15,682)	No Activity		No Activity		0	0
NVL									No Activity		none	
NEAL	5,195	5,195	(3,711)	(3,711)	(5,104)	(102,001)	11,385	(133,786)	5,562	(27,710)	14,609	(2,937)

[1] Full names of air freight forwarders set forth in this appendix on page 22.

Air Freight Forwarders

Profit and Loss

Calendar Years 1961 Through 1965 and Six Months Ended June 30, 1966

Freight Forwarder[1]	Calendar Year 1961		Calendar Year 1962		Calendar Year 1963		Calendar Year 1964		Calendar Year 1965		Six Months Ended June 30, 1966	
	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight
OLLENDORF	(773)	(2,627)	(1,181)	7,531	1,576	2,215	9,623	4,032	10,681	(2,861)	(1,623)	(10,320)
PACIFIC	3,192	43,155	(28,569)	(15,664)	44,059	47,541	(21,640)	104,616	88,151	89,419	6,600	(39,100)
PA			(14,723)	(15,621)	8,734	(2,575)	(7,167)	(4,457)	3,315	18,727	1,857	20,882
PMC	11,261	(8,996)										
PF					2,971	1,255	2,645	(22,019)	37,362	(33,334)	31,716	(8,319)
PFE												
RAF			2,777	2,777	8,870	8,870	NO ACTIVITY		19,725	19,725	15,767	15,767
REX											(119)	(1,328)
RTP	73,978		15,395		55,093	24,340	118,542	(337,621)	233,130	17,534	(158,948)	29,681
SVL									(1,018)			
SAC									(1,327)	(1,327)	(695)	(695)
SHULMAN	1,279	(274,274)	(20,600)	370,380	(112,567)	53,546	81,019	85,661	113,348	81,904	91,329	61,684
COMET												
SC	(1,796)	(1,796)	(2,859)	(2,860)	(1,696)	(1,696)	(3,732)	(3,733)	(403)	(403)	(46)	(46)
SKYLINE	NONE		(331)	(330)	2,959	2,959	NO ACTIVITY		15,377	15,377	1,492	1,492
SMITH	(14,449)	2,536	38,871	38,572	36,666	30,104	52,043	29,316	6,934	(77,189)	(12,774)	22,484
SM									4,091	7	(73,070)	4,863
SAF									12,493	(12,833)	117	(35,050)
TD												
TAS	(58,730)	(91,333)	51,925	(12,478)	(60,093)	329,070	(24,295)	(14,589)	(66,513)	(994)	29,151	26,854
TGF									(90,110)	(114,817)	(33,498)	(55,213)
TOV									(25,529)		(68,782)	1,375
TP									(61)	(61)	637	637

[1] Full names of air freight forwarders set forth in this appendix on page 22.

Air Freight Forwarders

Profit and Loss

Calendar Years 1961 Through 1965 and Six Months Ended June 30, 1966

Freight Forwarder[1]	Calendar Year 1961		Calendar Year 1962		Calendar Year 1963		Calendar Year 1964		Calendar Year 1965		Six Months Ended June 30, 1966	
	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight	Overall	Airfreight
UFS					9,890		6,883		10,433		14,893	
UPS	116,580	116,580	129,813	129,811	131,744	131,744	197,581	197,560	276,436	276,436	183,408	183,408
VAN					NONE		(80,770)		(47,941)		(32,655)	
TFA									276,601	2,988	(175,273)	10,171
PARIS									NO ACTIVITY		NONE	
WTC	103,187	35,890	27,360	60,985	146,984	182,247	120,912	117,848	547,557	535,781	190,019	136,019
WCA	(11,053)	(11,053)										
WV									(10,485)	2,606	92,944	3,310
WILEY	106,467		75,092		78,661	44	119,076	(18,326)	115,628	(8,579)	34,332	(1,506)
WAF												
WILSON	13,512	(4,294)	18,177	13,292	19,397	29,616	21,778	34,724	32,826	39,807	19,305	15,676
WWE	208,475	97,465	51,070	(47,009)	185,516	173,101	178,451	165,436	515,018	475,822	171,460	121,788
WITS			(1,323)	(2,828)	1,328	67	6,000	2,768	531	6,851	(13,018)	(13,710)
WAC							NO CARGO		(3,664)	(2,950)		
JENSEN	1,264	1,264	2,274	2,274	(19)	(18)	1,103	1,102	1,568	(3,073)		
WWS	(22,259)	(44,334)	3,163	(176,013)	(45,638)	(22,195)	(163,140)	45,654	3,429	13,627	(28,912)	(55,775)
TOTAL[3]	8,832,116[3]	2,208,772[3]	9,824,103[3]	2,386,489[3]	16,118,538[3]	3,103,668[3]	27,433,557[3]	3,142,902[3]	35,197,914[3]	6,068,608[3]	19,677,808	2,084,705

[1] Full names of air freight forwarders set forth in this appendix on page 22.

[3] Total is not sum of items in all cases due to reporting discrepancies.

Freight Forwarder 1/	Total Assets				
	19X7	19X6	19X5	19X4	19X3
AAA	45,034	71,018	58,110	69,640	41,044
ABC	739,198	683,041	675,716	900,204	[illegible]
ABBOTT	12,448	21,063	[illegible]	24,772	[illegible]
ACE					[illegible]
ATW	316,151	147,801	[illegible]	[illegible]	[illegible]
[illegible]			[illegible]	[illegible]	[illegible]
AIC	[illegible]	521,111	[illegible]	[illegible]	[illegible]
AIMC-GD	421,704	[illegible]	[illegible]	[illegible]	[illegible]
AIMC-F	18,875	17,385	[illegible]	[illegible]	[illegible]
AIMC-M					
[illegible]	[illegible]				
[illegible]	[illegible]				
[illegible]	[illegible]				
[illegible]					[illegible]
[illegible]	6,471	5,591	[illegible]	[illegible]	[illegible]
AIR SEA	534,451	396,905	[illegible]	[illegible]	[illegible]
AIR-SEA	15,168	[illegible]	[illegible]	[illegible]	[illegible]
AET	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
AF			[illegible]	[illegible]	[illegible]
APC	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
APD	33,151				
APC				[illegible]	[illegible]
ASP-SAIS	19,40	10,655	[illegible]	[illegible]	[illegible]

1/ Full names of air freight forwarders set forth in table appearing on page 11.

Net worth (Net Proprietary Capital)				
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2,908	6,546	(44,672)	(42,715)	3,[illegible]
[illegible],107	[illegible]	196,220	(174,861)	(41,80[illegible]
(28,59[illegible]	(9,180)	[illegible]	[illegible]	[illegible]
				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]		[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]				
[illegible]				
[illegible]				
[illegible]				
[illegible]				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]		[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Freight Forwarder 1/	Total Assets				
	1962	1963	1964	1965	1966
AIR-LAND	14,272	13,612	14,080	14,251	14,591
AIR-SEA	111,784	125,125	221,764	179,459	273,334
AIRBORNE	2,805,578	3,198,079	3,559,928	3,646,978	4,423,434
AIRSPEED	4,401	4,215	8,431	6,469	5,516
ALAS	59,734	85,866	43,261	60,522	52,711
ALASKA		10,626	23,524	31,140	48,404
ALBATS	61,333	84,252	113,191	105,934	201,800
ALT	47,754	47,905	47,012	52,468	71,035
[illegible]	[illegible]	[illegible]			
[illegible]	148,368	[illegible]	[illegible]		
[illegible]		[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
ALZ	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
AMC	6,380				
AMI	[illegible]	40,324	62,544	66,159	71,[illegible]
AMS				27,866	30,947
AMP	[illegible]	47,755	[illegible]	157,145	[illegible]
AMSCO					887,123
AMSETT	47,063	47,[illegible]	47,995	51,761	[illegible]
ANA	4,458	5,222	5,050	5,415	5,822
ANA-SEA	1,457	1,457	2,218	2,428	
ANSETT					177,305
ANSETT					

1/ Full names of air freight forwarders set forth in this appendix on page 15.

Net Worth (Net Proprietary Capital)				
1962	1963	1964	1965	1966
13,369	13,066	13,315	13,326	13,440
46,259	44,220	45,672	50,400	54,158
999,411	1,113,698	1,268,112	1,904,467	2,985,488
4,403	4,190	3,378	1,621	597
16,[illegible]	21,[illegible]	19,998	23,167	22,749
	1,951	(1,903)	(3,482)	(10,112)
857	(1,037)	23,512	15,710	36,048
4,755	11,145	17,732	19,[illegible]	27,224
(22,362)	(121,[illegible])			
(26,[illegible])	[illegible]	11,[illegible]	(1,[illegible])	
	3,[illegible]	[illegible]	[illegible]	[illegible]
457,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
46,000,216	51,062,310	(1,123,207	5,[illegible]	[illegible]
1,914				
5,300	28,196	[illegible]	18,[illegible]	32,544
			14,132	11,364
8,834	24,202	40,[illegible]	72,441	92,[illegible]
				106,502
9,449	11,112	11,268	13,[illegible]	15,124
1,101	1,875	4,171	4,[illegible]	[illegible]
880	500	247	([illegible]	
				44,871

Freight Forwarder [1]	Total Assets				
	19[illegible]	19[illegible]	19[illegible]	19[illegible]	19[illegible]
BEKINS				2,434	25,[illegible]
BERKLAY					30,[illegible]
BERNARD	342,222	345,694	2[illegible],452	[illegible],[illegible]4	[illegible],[illegible]4
BOR-AIR	238,[illegible]4	403,569	4[illegible],[illegible]5	[illegible],[illegible]3	[illegible],[illegible]0
BRAKE			2[illegible],[illegible]0	[illegible],[illegible]4	[illegible],[illegible]
BRITE					
BYRNE	[illegible],[illegible]6	4[illegible],899	[illegible]1,[illegible]2	[illegible]1,[illegible]4	[illegible]4,[illegible]6
CAL-AIR		14,805	31,[illegible]7	[illegible],[illegible]7	[illegible],[illegible]4
CAMPBELL	[illegible]6,[illegible]4				
CAPITAL				[illegible],[illegible]4	[illegible]
CARTWRIGHT					[illegible],[illegible]
[illegible]	[illegible],[illegible]2	[illegible],[illegible]3	[illegible],[illegible]4	[illegible]	[illegible],[illegible]
[illegible]	21,[illegible]0	[illegible],[illegible]5	[illegible],[illegible]	[illegible],[illegible]4	[illegible],[illegible]
CETA					
CHURCHILL				[illegible]	
CCE				[illegible]0,[illegible]3	[illegible],[illegible]4
CLIFF					[illegible],[illegible]
AFT				[illegible]4,[illegible]1	[illegible],[illegible]4
DAF	47,962	246	[illegible]		
DFT					[illegible],[illegible]4
DSI	[illegible]2,[illegible]1	26[illegible],[illegible]2	[illegible],[illegible]7	[illegible],[illegible]0	[illegible],[illegible]1
DEAN					[illegible],[illegible]4
DAF			16,[illegible]8	[illegible],[illegible]2	[illegible],[illegible]

1/ Full names of air freight forwarders set forth in this appendix on page 13.
2/ Excludes $[illegible],000 "Appraised Surplus" figure.

Net Worth (Net Proprietary Capital)				
1962	1963	1964	1965	1966
			1,598	
				12,[illegible]
[illegible],654	(69,207)	(31,442)	14,[illegible]	
47,009	120,429	127,625	[illegible]	[illegible]
		144,267	230,432	
253,460	250,168	170,103	[illegible],325	261,[illegible]
	13,882	20,208	45,861	12,987
18,450				
			[illegible]	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
			500	
			323,577	
				1,084
			[illegible]	
[illegible]	[illegible]			
				1,084
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
		[illegible]	[illegible]	[illegible]

Freight Forwarder 1/	Total Assets				
	1962	1961	1964	1965	1966
DAE			167,813	167,143	354,112
DOWF	40,268				
DON	220,592	289,004	345,183	402,724	619,702
EAGLE				18,797	29,488
EAF	4,602,029	5,378,650	6,946,320	9,063,172	11,612,332
EMPICO		1,860,497	1,986,682	2,545,435	2,432,492
EFA	1,733	1,418	1,524	1,452	1,820
ENGEL					550,043
EXPRESS		57,052	118,868	115,292	323,255
FALCON		24,269			
FLETE	58,697	51,158			
FLYING	475,823	552,213	532,200	829,687	289,093
FMS			50,823	54,117	56,976
FRONTIER					103,094
FSS	64,867	91,383	52,798	49,111	69,470
G-A	95,803	101,594	185,852	283,369	359,550
FREIGHTER	746,403	971,571	156,293	268,360	247,903
GAF	33,831	98,135	97,633	135,962	
GAT	939	None	908	318	186
GAC	107,707	116,319	146,541	87,297	127,086
GVL				2,718,517	4,062,725
GSC	303,000	361,922	503,846	607,854	766,954
[illegible]	7,652	4,485	7,386	4,502	8,142

1/ Full names of air freight forwarders set forth in this appendix on page 15.

Net Worth [Net Proprietary Capital]				
1962	1963	1964	1965	1966
		19,269	31,763	143,074
7,420				
128,728	162,342	205,792	302,628	2[illegible],658
			4,544	14,276
2,414,745	2,978,045	3,759,509	4,654,344	[illegible],104,068
	1,420,914	1,512,245	1,[illegible],463	1,[illegible],361
1,733	1,418	1,108	1,310	1,[illegible]8
				394,519
	(14,878)	15,209	18,671	[illegible]
	1,353			
3,958	[illegible],278			
32,340	45,888	60,611	[illegible]	[illegible]
		43,667	[illegible]	[illegible]
				51,563
21,175	19,312	(8,300)	(40,282)	(34,954)
80,537	38,911	53,029	44,918	[illegible],124
358,864	375,382	59,043	105,683	[illegible],738
20,033	28,644	34,424	[illegible]	
339	(95)	650	318	68
24,319	47,288	38,218	10,417	[illegible]
			1,395,063	[illegible]
177,546	178,924	210,107	[illegible]	[illegible]
481	1,348	2,347	(1,824)	[illegible]

Freight Forwarder 1/	Total Assets				
	1,962	1,963	1,964	1,965	1,966
HAMLE					
KBL	284,363	445,317	290,645	104,857	
KAF					
KOP					
IAF					
IFF					
MAF					
				47,304	
NAF					
NPPC		12,237	10,844		
TOTAL					

1/ Full names of air freight forwarders set forth in this appendix on page 3.

Net Worth (Net Proprietary Capital)				
1962	1963	1964	1965	1966
191,961	208,470	187,233	214,133	
		12,376		
350	663	1,522	11,146	
24,720	9,763	11,196		
,417	75,085			
15,414	22,495	57,341		
145,217	145,904	147,162		
	0			
	1,66			
			15,000	
1,000	1,000	1,000	1,000	
	(10,045)	82,321		

Freight Forwarder 1/	Total Assets				
	1960	1961	1962	1963	1964
ALLENBERRY	49,250	42,716	40,642	51,498	71,998
PACIFIC	222,924	347,712	638,266	1,068,697	2,767,210
PA	24,028	76,805	73,024	108,065	162,437
PF		60,325	180,081	254,572	300,838
PFE					
RAT	9,694	25,794	50,829	41,510	63,195
RFX					
RTT	615,976	1,207,231	1,990,473	2,111,595	2,531,501
SVL					1,168,321
SAI				215	4,[illegible]
SFTRAS	1,178,247	1,247,584	1,[illegible]	1,223,[illegible]	1,[illegible]
[illegible]					
[illegible]	4,762	4,304	3,212	[illegible]	[illegible]
SKYLINE	3,727	10,642	8,[illegible]	13,342	16,239
SMITH	292,527	337,539	361,213	477,302	550,428
SP					28,824
SAP				42,413	65,820
TC					
TAE	353,558	528,560	736,[illegible]	Any,926	[illegible]
TCP				45,639	55,420
TEV					1,228,169
TF					3,309
UPS		273,059	31[illegible],825	365,[illegible]	444,617

1/ Full names of air freight forwarders set forth in this appendix on page 15.

Net Worth (Net Proprietary Capital)				
1960	1961	1962	1963	1964
6,373	6,787	8,196	12,722	21,811
50,829	94,017	160,317	230,819	632,080
6,216	2,804	20,304	17,809	22,017
	23,381	38,633	70,352	101,341
0	18,973	39,498	29,517	43,413
			12,416	13,516
156,014	67,214	112,773	659,157	588,635
				263,820
			10,000	10,000
118,483	12,149	47,301	97,111	171,151
5,065	4,500	2,373	(137)	(715
2,577	6,157	8,034	10,562	14,246
59,033	53,162	48,154	66,756	37,923
				57,911
			27,059	40,549
183,635	198,112	89,920	145,278	139,555
			(39,831)	(58,606)
				266,39.
				3,175
	73,333	74,845	98,748	40,804

Freight Forwarder 1/	Total Assets				
	1962	1963	1964	1965	1966
UPS	260,724	348,444	312,038	411,737	588,704
VAN		832,582	831,751	1,506,872	1,126,406
TFA				1,510,546	2,407,739
PARIS					193,536
WTC			746,783	1,028,446	1,536,328
SV					2,290,884
WILEY	417,984	447,471	648,117	767,526	1,048,[illegible]
WAF					
WILSON				122,389	129,906
WAE	863,561	769,278	988,948	1,199,475	1,[illegible]
WITS	43,346	47,370	80,383	77,569	133,845
WAC				42,082	
JENSEN					
WWS	465,194	519,384	616,025	392,431	284,860
TOTAL	658,547,538	719,304,484	823,671,301	938,281,735	1,069,241,744

1/ Full names of air freight forwarders set forth in this appendix on page 15.

Net Worth [Net Proprietary Capital]				
1962	1963	1964	1965	1966
209,042	208,493	79,006	113,903	191,735
	279,414	725,856	433,[illegible]85	627,[illegible]59
			953,471	1,303,[illegible]59
				30,73[illegible]
		107,771	269,586	444,[illegible]20
				[illegible]60,075
75,100	110,102	158,430	213,716	280,132
			45,698	55,00[illegible]
487,324	508,050	602,213	763,[illegible]28	1,120,484
38,409	39,184	42,195	[illegible]49,[illegible]4	51,[illegible]82
			24,310	
34,120	14,186	6,218	117,558	(162,176)
55,998,760	62,531,311	74,089,484	92,978,052	105,100,[illegible]38

ABBREVIATIONS AND DECODING LIST

AAA	– AAA Air Express, Inc.
AAC	– Amerford International Corp. d/b/a Amerford Air Cargo
AAF	– Associated Air Freight, Inc. (A Virginia Corp.)
AAFI	– Allied Air Freight, Inc.
AAI	– Andrews Air International, Inc.
AAT	– All-Air Transport, Inc.
ABBOTT	– Abbott Air Freight Co.
ABC	– ABC Air Freight Co.
ACC	– Air Cargo Consolidators, Inc.
ACD	– Air Cargo Division of Frederic C. Henjes, Jr., Inc.
ACE	– Ace-R. B. Van Lines, Inc.
ACME	– Acme Air Cargo, Inc.
ACS	– Air Cargo Specialists, Inc.
ACT	– William J. Brosham & Charles A. Dasey d/b/a Air Cargo Transport
ACTIVE	– Puerto Rican Forwarding Co. d/b/a Action Air Freight
ADD	– ADD Airfreight Corp.
AEC	– American Express Company
AEI	– Air Express International Corp.
AEL	– Anderson Express Ltd.
AERO-EX	– Superior Fast Freight d/b/a Aero-Ex
AERO-F	– Honolulu Air Cargo d/b/a Aero Forwarding
AERO-SF	– Carl K. Sparks d/b/a Aero Special Air Freight
AERO-TRANS	– Express Forwarding & Storage Co. d/b/a Aero Transport Division
AF	– Harry Bohrer d/b/a Air Freight
AFC	– Air Freightways Corp.
AFD	– Clipper Carloading Co. d/b/a Air Freight Division
AFS	– Air Freight Service Corp.

AIRBORNE	– Airborne Freight Corp.
AIR DIS	– Air Dispatch, Inc.
AIR-EX	– Robert P. Reese & Earl B. Jones d/b/a Air Expediting Co.
AIR-LAND	– Air-Land Freight Consolidators
AIR-LANES	– Air Lanes Service, Inc.
AIR-OVER	– Air-Overseas Corp.
AIR-SEA	– Air-Sea Forwarders, Inc.
AIRSEMBLY	– Airsembly Forwarders, Inc.
AIRWAYS	– Airways Parcel Post Service, Inc. d/b/a Airways Air Freight
ALAS	– Alas I. Bero Americanas, Inc.
ALASKA	– Alaska Air Forwarding Corp.
ALLIED	– Allied Air Freight International Corp.
ALLSTATES	– Allstates Air Cargo, Inc.
APEX	– Apex Air Freight, Inc.
BADER	– Bader Bros. Van Lines, Inc.
BARNETT	– Barnett Aircargo, Inc.
BAR-SAN	– Bar-San Aircargo, Inc.
BEACON	– Beacon Shipping Co., Inc.
BEHRING	– Behring-South Ports Shipping, Inc.
BEKINS	– Bekins Air Van Company
BERKLAY	– Bernard Klainberg d/b/a Berklay Air Service Corp.
BERNACKI	– Peter A. Bernacki, Inc. (Jet Air Freight Division)
BIA	– Barnett International Airfreight Corp.
BOR-AIR	– Bor-Air Freight Co., Inc.
BRAKE	– Brake Delivery Service d/b/a Brake Air Freight Division
BRUCE	– Bruce Transfer Corp.
BYRNES	– W. J. Byrnes and Company of New York, Inc.

CAF	– Consolidated Air Freight
CAFF	– Commercial Traffic Service d/b/a Commercial Air Freight Forwarding
CAFI	– Connecticut Air Freight, Inc.
CAL-AIR	– Cal-Air Forwarders
CAMPBELL	– Campbell, Thomas J. & Associates
CAPITAL	– Capital Air Freight, Inc.
CARTWRIGHT	– Cartwright, Inc.
CEP	– Columbia Export Packers, Inc.
CFI	– Continental Forwarders, Inc.
CHICAGO	– Chicagoland Air Freight (Warder & Konlon)
CIRCLE	– Circle Airfreight Corp.
CITY	– City Messenger Air Express and/or CMAX
CLEVELAND	– Cleveland Air Forwarding, Inc.
COMET	– Silver Fleet, Inc. d/b/a Comet Air Freight
CSI	– Copeland Shipping, Inc.
DAE	– Domestic Air Express, Inc.
DAF	– Direct Air Freight Corp.
D. C.	– D. C. Andrews & Co., Inc.
DEAN	– Dean Van Lines, Inc.
DORF	– Dorf International, Ltd.
DOW	– Frank P. Dow Co., Inc. (A Washington Corp.)
EAF	– Emery Air Freight Corporation
EAGLE	– Eagle Air Dispatch, Inc.
EFA	– Empire Foreign Air Forwarders, Inc.
ENGEL	– Engel Brothers, Inc.
ENTICO	– Empire Carriers Corp. d/b/a Entico Air Freight Service
EXPRESS	– Express Air Freight, Inc.
FALCON	– Falcon Air Freight, Inc.
FLETE	– Flete International Corp.

FLYING	– Flying Cargo, Inc.
FMS	– Flying Mailmen Service, Inc.
FREESLATE	– Freeslate International Corp.
FSS	– Foreign Shipping Service, Inc.
4-A	– 4-A Air Freight Corp.
GAC	– Global Air Cargo, Ltd.
GAF	– General Air Freight, Inc.
GAT	– Gilbert Air Transport Corp.
GSC	– Globe Shipping Co., Inc.
GVL	– Global Van Lines, Inc.
HAF	– John Holahan d/b/a Holahan Air Freight
HARLE	– Harle Consolidators Intl. (A division of Harle Services, Inc.)
HBL	– Hensel, Bruckmann & Lorbacher, Inc.
HOP	– Hop Air Freight Forwarder, Inc.
IAF	– Imperial Air Freight Service, Inc.
ICS	– International Customs Service, Inc.
IEP	– International Export Packers, Inc.
IMF	– Inter-Maritime Forwarding Co., Inc.
IMS	– Intra-Mar Shipping Corp.
IST	– International Sky Traders (W. E. Robb)
JAF	– Jet Transportation, Inc. d/b/a Jet Air Freight
JENSEN	– World Freight Forwarders d/b/a Jensen Air Freight
JES	– Joyce Expediting Service
JET	– Jet Forwarding, Inc.
KEC	– Karr, Ellis & Co., Inc.
KEY	– Key Air Freight, Inc.

LeMARK	– Arnold S. Grant d/b/a LeMark Air Freight Service
LOOMIS	– Loomis Courier Service, Inc.
MAF	– Medallion Air Freight Corp.
MARK IV	– Mark IV Air Freight, Inc.
MEYER	– Herb B. Meyer & Co., Inc.
MURRAY	– Thomas & James Murray d/b/a Murray Air Freight Services
NAF	– National Air Freight Forwarding Corp.
NEAL	– New England Air Lift, Inc.
NMC	– National Movers Co., Inc.
NPPS	– National Post-Pak System
NVL	– National Van Lines, Inc.
OLLENDORF	– H. G. Ollendorf, Inc.
PA	– Panalpina Airfreight, Inc.
PACIFIC	– Pacific Airfreight, Inc.
PARIS	– B. Von Paris & Sons, Inc.
PF	– Penson Forwarding Corp.
PFE	– Petry & Co's. Foreign Express (Division of Trans-World Shipping)
PMC	– Pan-Maritime Cargo Service, Inc.
RAF	– Ramar Air Freight Corp.
RENNIE	– Footner & Co., Inc. d/b/a Rennie Footner Air Express Service
REX	– Rex Air Freight, Inc.
RTP	– Routed Thru-Pac, Inc.
SAC	– Service Air Cargo
SAF	– Supreme Air Freight Corp.

SC	– Sky-Courier, Inc.
SHULMAN	– Shulman, Inc.
SKYLINE	– Skyline Air Freight, Inc.
SM	– Sunpak Movers, Inc.
SMITH	– J. D. Smith Inter-Ocean, Inc.
SVL	– Security Van Lines, Inc.
TAS	– Trans-Air System, Inc.
TD	– Traffic Dynamics
TFA	– Van-Pac Carriers d/b/a Thru-Flight Air Freight Forwarders
TGF	– Trans-Global Freight, Inc.
TOV	– Trans-Ocean Van Service
TP	– Trans-Pacific Air Cargo
UFS	– United Forwarders Service, Inc.
UPS	– United Parcel Service Co.
VAN	– Van-Pak, Inc.
WAC	– Worcester Air Cargo, Inc.
WAF	– Wilson Air Freight, Inc.
WCA	– West Coast Airfreight Co., Inc.
WILEY	– James G. Wiley Co.
WILSON	– Wilson's American Co., Inc.
WITS	– Wits, Inc. d/b/a Wits Air Cargo Service
WTC	– WTC Air Freight
WV	– Wheaton Van Lines
WWE	– Wings & Wheels Express, Inc.
WWS	– World Wide Services, Inc.

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That operating authorizations to engage in air transportation as domestic and international air freight forwarders in accordance with the provisions of Parts 296 and 297 of the Economic Regulations of the Board be issued to CF Air Freight, Inc., D. C. International, Inc., and Navajo Freight Lines, Inc., for an experimental period of five years from the effective date of this order;

2. That operating authorizations to engage in air transportation as a domestic air freight forwarder in accordance with the provisions of Part 296 of the Economic Regulations of the Board be issued to P.I.E. Air Freight Forwarding, Inc., for an experimental period of five years from the effective date of this order;

3. That the control of P.I.E. Air Freight Forwarding Inc., by Pacific Intermountain Express Co., and the interlocking relationships involved therein be and they hereby are approved;

4. That the control of National Air Freight Forwarding Corporation by Pacific Intermountain Express Co., and the interlocking relationships involved therein be and they hereby are approved for an experimental period of five years;

5. That control of CF Air Freight, Inc., by Consolidated Freightways, Inc., and the interlocking relationships involved therein be and they hereby are approved;

6. That approval of the common control and interlocking relationships described in paragraphs 3, 4, and 5 hereof shall be subject to the provisions of Part 251 of the Board's Economic Regulations now in effect and as hereafter amended;

7. That the Board shall retain jurisdiction over this proceeding for the purpose of reviewing the approvals of the common control and interlocking relationships granted herein and/or of imposing at any time, with or without hearing, such other conditions as the Board may find just and reasonable; and

8. That this order shall become effective as the final order of the Board on the 31st day after the date of service of this order and the initial decision attached hereto unless a petition for discretionary review is filed within 25 days after service hereof in accordance with Rule 28 of the Rules of Practice in Economic Proceedings (14 CFR 302.28) or the Board issues an order to review on its own initiative. If a petition for discretionary review is timely filed or if action to review is taken by the Board upon its own initiative, the effectiveness of this order shall be stayed until further order of the Board.

/s/ Merritt Ruhlen
Hearing Examiner

§101(3), 72 Stat. 737, as amended, 49 U.S.C. §1301(3) (1964)

§1301. Definitions

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

§102, 72 Stat. 740, 49 U.S.C. §1302 (1964)

§1302. Consideration of matters in public interest by Board

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics."

§408(a)(5), 83 Stat. 103 (1969), Pub. L. No. 91-62 §2 (Aug. 20, 1969), amending 49 U.S.C. §1378 §1378(a)(5).

§1378. Consolidation, merger, and acquisition of control– Prohibited acts.

(a) It shall be unlawful unless approved by order of the Board as provided in this section –

> "(5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided*, That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;".

§408(b), 72 Stat. 767, as amended, 49 U.S.C. § 1378(b) (1964)

Application to Board; hearing; approval; disposal without hearing

(b) "Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control:" "*Provided further*, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to

public advantage in its operation and will not restrain competition: *Provided further*, That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

§1006(a), 72 Stat. 795, 49 U.S.C. §1486(a) (1964)

§1486. Judical review—Orders subject to review; petition for review

(a) "Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

ECONOMIC REGULATIONS OF THE CIVIL AERONAUTICS BOARD

§296.43, 14 C.F.R. §296.43 (1969)

§296.43. Issuance of Operating Authorization.

(a) *To successful parties to the investigation.* Any air freight forwarder applicant whose application for issuance or renewal of operating authority was approved in the Air Freight Forwarder Investigation, Docket No. 5947 *et al.*, shall be issued an Operating Authorization bearing the same effective date as this part.

(b) *To all other applicants.* (1) If, after the filing of an application for an Operating Authorization, it appears that the applicant is capable of performing the air transportation authorized by this part as an air freight forwarder and of conforming to the provisions of the act and all rules and requirements thereunder, and that the conduct of such operations by the applicant will not be inconsistent with the public interest, the applicant will be notified by letter. Such notification will advise the applicant that upon the filing of a valid tariff, an Operating Authorization will be issued to the applicant unless it has engaged in unauthorized air transportation or other activities prohibited by the act or the rules and regulations of the Board between the date of such notification and such filing. In the latter event, an Operating Authorization will not be issued unless and until a due showing is made by the applicant that it has terminated such unauthorized or prohibited activities, and that the issuance of such an authorization would be consistent with the public interest.

(2) If, after the filing of an application for an Operating Authorization, it appears that the applicant has not made a due showing of capability or that the conduct of operations by the applicant might otherwise be inconsistent

with the public interest, the Board shall by letter notify the applicant of its findings to that effect. The Board may dismiss any such application unless within 30 days of the date of the mailing of such letter, the applicant has in writing requested reconsideration and submitted such additional information as it believes will make the necessary showing, or requested that the application be assigned for hearing, in which case the applicant shall outline the evidence to be presented at such hearing and shall show the need for hearing in order to properly present its case.

(3) In the event that reconsideration or hearing is requested the Board may, without notice or hearing, enter an order of approval or of disapproval in accordance with its determination of the public interest upon the showing made, or on its own initiative may assign the application for hearing.

§296.86, 34 Fed. Reg. 19342 (1969) (originally promulgated with the order here under review on April 21, 1969)

§296.86. Criteria for authorization.

The Board will approve the application if it appears that:

(a) the applicant is capable of performing the proposed air transportation and of conforming to the provisions of the Act and all rules and requirements thereunder;

(b) the applicant will conscientiously promote air cargo and will benefit air transportation; and

(c) the applicant's operations, alone or together with those of other similar carriers granted air forwarding authority, will not create a monopoly or monopolies and

thereby restrain competition or jeopardize another air carrier, or otherwise be inconsistent with the public interest.[4]

§297.34, 14 C.F.R. §297.34 (1969)

§297.34. Issuance of operating authorization to all other applicants.

(a) If, after the filing of an application for an Operating Authorization, it appears that the applicant is capable of performing the air transportation authorized by this part as an international air freight forwarder and of conforming to the provisions of the Act and all rules and requirements thereunder, and that the conduct of such operations by the applicant will not be inconsistent with the public interest, the applicant will be notified by letter. Such notification will advise the applicant that upon the filing of a valid tariff within a specified period, an operating authorization will be issued to the applicant, unless the Board finds that it has engaged in unauthorized air transportation or other activities prohibited by the Act or the rules and regulations of the Board between the date of such notification and such filing. In the latter event, an operating authorization will not be issued, unless and until a due showing is made by the applicant that it has terminated such unauthorized or prohibited activities, and that the issuance of such authorization would be consistent with the public interest.

(b) No operating authorization will be issued to an applicant who will not have sufficient branch offices, associated companies, affiliated companies, or agents located outside the continental United States to perform pick-up

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[4] Section 399.20 (Policy Statements) articulates decisional standards in this area.

or delivery, consolidation or break-bulk, and to render customs and other necessary services to be performed in conjunction with handling shipments, with reasonable effectiveness for the benefit of the shipping public.

(c) No operating authorization will be issued to an applicant which has, or proposes to have, as owner, partner, manager, officer, director, or stockholder holding a controlling interest, any person who is or has been connected in any such capacity with any other international air freight forwarder, air freight forwarder, cooperative shippers association, irregular air carrier, supplemental air carrier, or noncertificated cargo carrier, if the letter of registration, operating authorization, or other exemption authority of such carrier was suspended or revoked by the Board on account of acts or omissions which occurred during the time of such connection: *Provided, however*, That an operating authorization may be issued to such an applicant where the Board finds, upon a showing by an applicant, that the public interest and applicant's intention and ability to conform to the provisions of the Act and requirements thereunder are not adversely affected by such relationship.

(d) If, after the filing of an application for an operating authorization, it appears that the applicant has not made due showing of capability or that the conduct of operations by the applicant might otherwise be inconsistent with the public interest, the Board may on its own motion assign the application for hearing, or may notify the applicant by letter of its intention to dismiss such application. Within 30 days of the date of the mailing of such letter the applicant may make written request for reconsideration and submit such additional information as it believes will make the necessary showing, or request that the application be assigned for hearing, in which case the applicant shall outline the evidence to be presented at such hearing and shall show the need for hearing in order to properly present its case.

(e) In the event that reconsideration or hearing is requested, the Board may, without notice or hearing, approve or disapprove the application in accordance with its determination of the public interest upon the showing made, or on its own initiative may assign the application for hearing.

§297.66, 34 Fed. Reg. 19343 (1969) (originally promulgated with the Order here under review on April 21, 1969).

§297.66. Criteria for authorization.

The Board will approve the application if it appears that:

(a) the applicant is capable of performing the proposed air transportation and of conforming to the provisions of the Act and all rules and requirements thereunder;

(b) the applicant will conscientiously promote air cargo and will benefit air transportation; and

(c) the applicant's operations, alone or together with those of other similar carriers granted air forwarding authority, will not create a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier, or otherwise be inconsistent with the public interest.[4]

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[4] Section 399.20 (Policy Statements) articulates decisional standards in this area.

§2(e), 80 Stat. 388 (1966), 5 U.S.C. §558(c) (Supp. IV, (1969).

§558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

§8(b), 80 Stat. 387 (1966), 5 U.S.C. §557(c) (Supp. IV, 1969).

§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1105

ABC AIR FREIGHT COMPANY, INC., ET AL., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents*.

BRIEF OF YELLOW FREIGHT SYSTEM, INC., GLOBAL AIR CARGO, LTD., GATEWAY TRANSPORTATION CO., INC., AND GATEWAY AVIATION, INC., RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: February 20, 1970

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INTRODUCTION

Come now Yellow Freight System, Inc., Global Air Cargo, Ltd., Gateway Transportation Co., Inc., and Gateway Aviation, Inc., respondents in the above-styled proceeding, and respectfully submit their brief in opposition to the petition for a *writ of certiorari* to the United States Court of Appeals for the Second Circuit.

THE SENSE OF THE PETITION

The petition urges three arguments for the issuance of the writ of certiorari. It is alleged:

1. The entry of long-haul truckers into air freight forwarding will be hurtful to the public interest.

2. There is a fixed Congressional policy which has been violated.

3. Approval by the court below of the decision by the Civil Aeronautics Board circumvents and undermines the Administrative Procedure Act.

None of the foregoing allegations constitutes reason for granting the writ.

NO HARM TO PUBLIC INTEREST

Although the petitioners urge considerations of the public interest to support their argument against the entry by the long-haul truckers into air freight forwarding, the plain goal of petitioners is insulation against competition. They were fully answered by the Board when it observed that it has long interpreted the statutory provisions under which it operates as signifying the recognition by Congress "that the Board's duty towards air cargo is to protect competition—not competitors" (A.21). Moreover, the Board found that the existing air freight forwarders cannot adequately provide the diligent efforts needed to generate air freight from wider and more diverse sources (A.26-27). The Board chose, however, to authorize a limited number of trucker air freight forwarders in a controlled experiment to insure that the competition thus introduced would not become hurtful to the public interest (A.35-36). The court below, on review, accepted as sincere the Board's plans for the controlled experiment and sustained its decision (A.11-13).

Under the foregoing circumstances, the Supreme Court should not concern itself with the factual findings respecting need for and impact of the proposed authorizations. *Southern Power Co.* v. *North Carolina Public Serv. Company,* 263 U.S. 508 (1924). Neither should the Court concern itself with the private interests of the litigants before it, *Layne and Bowler* v. *Western Wellwork,* 261 U.S. 387 (1923); *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1954). Possible injury to the petitioners as a result of new competition is not a justiciable issue at this stage of the cause.

NO FIXED CONGRESSIONAL POLICY

Although the central concept of the petition is that the authorization of the Board, sustained by the court below, of the three successful motor carrier applicants to engage in air freight forwarding is violative of an established Congressional policy against surface carriers controlling or themselves becoming air freight forwarders, there has been no demonstration whatever that such a policy actually exists. In the very decision of the Board on remand, which the court below sustained, the Board specifically and categorically denied that there is any such Congressional policy (A.18-21). The petition tries hard to read a contrary meaning into the first opinion by the court below, but the most that was there said is that an *agency* policy of granting surface carriers air freight forwarding authority only after a rather special showing had not been "wholly agency determined but is a radiation from a direction of Congress" (A.102).

The foregoing is a far cry from a definitive holding that there is a Congressional policy of exclusion of surface carriers from the air freight forwarding field. In-

deed, the very observation of the court below that the Board had in the past granted air freight forwarder authorizations to surface carrier interests only when satisfied as to the competitive impact of so doing is itself a denial of the concept that there is a Congressional policy against such entry. The decision of the Board upon remand traced the history of its treatment of surface carrier interests in the various air freight forwarder cases (A.22-24). In the first of those cases, *Air Freight Forwarder Case,* 9 C.A.B. 473 (1948), the Board had denied the applications of railroad affiliates, although it had issued appropriate authorization to motor carrier affiliates as well as to the affiliates of surface freight forwarders. In the companion proceeding, *Air Freight Forwarder Case (International),* 11 C.A.B. 182 (1949), the Board issued authorizations not only to affiliates of motor carriers and surface freight forwarders, but also to affiliates of the railroads as well. In its 1955 case, *Air Freight Forwarding Investigation,* 21 C.A.B. 536 (1955), the Board opened up the field of air freight forwarding to affiliates of the railroads and, finally, in *Air Freight Forwarder Authority* case, 40 C.A.B. 673 (1964), the Board again rejected the argument that there is a presumption against granting freight forwarding authority to applicants having direct surface transportation interests, holding instead that denial of entry would be ordered only where it appeared that conflicts of interest would arise so as to result in material diversion of traffic from air to surface and deprive the applicants of incentive to promote and develop air freight forwarding.

Even a casual inspection of the Board's pronouncements on the agency policy, which the court below in its initial opinion found to exist, is convincing that the

only relevant feature of any such policy is the desire on the part of the Board to promote air commerce. Absent the likelihood of a tendency to divert other traffic from movement by air, authorizations have been granted to motor carrier interests if the operating plan has satisfied the Board that it will generate air freight. The Board itself has summarized the trend of its regulation of the air freight forwarding industry as a narrowing of the shield of protection so as to allow increased competition from surface interests (A.23).

The Board's administrative policy has received tacit Congressional approval, as was suggested by the opinion of the Court below in its discussion of the significance of Public Law 91-62, Section 1(2), August 20, 1969, 83 Stat. 103, Amending Section 408(a)(5) of the Federal Aviation Act (A.7). That amendment authorized the Board to exempt any acquisition of a noncertificated carrier from the requirement of approval "to the extent and for such periods as may be in the public interest." The Conference Report No. 91-426, 91st Congress, 1st Session (Advance Sheet No. 8, U.S. Code Congressional and Administrative News, September 20, 1969) plainly shows that the only Congressional policy against participation by surface carriers in air operations is limited to those air activities which involve regulated functions as direct air carriers. Indeed, the Senate bill (S.1373) would have left to the Board's discretion whether or not to exempt from the requirement of prior approval acquisitions of any kind or class of air carrier and, in addition, would have permitted the Board to establish such expedited procedures as it deemed appropriate in those cases where it deemed its prior approval necessary. The House amendment, as recited in the Conference report, limited

the Board's authority "to exempt acquisitions from prior Board approval to acquisitions of noncertificated air carriers (such as air taxis and airfreight forwarders)" (Advance Sheet #8, U.S. Code Congressional and Administrative News, 91st Congress, 1st Session, page 1221). The House version was adopted and became law. By that action the Congress of the United States placed its stamp of approval upon the Board's prior administration of the provisions of Section 408(a)(5) of the Federal Aviation Act of 1958 (49 U.S.C. § 1378). There is no Congressional policy against the entry of surface carriers or surface carrier affiliates into the air freight forwarding business.

NO VIOLENCE HAS BEEN DONE TO THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

Section III and IV of the petition urged that the court below failed to give effect to the provisions of the Administrative Procedure Act in reviewing the opinion on remand of the Civil Aeronautics Board. It may here be observed, however, that this thrust of the petition is directed solely to the rules and regulations promulgated by the Board to govern the administrative processing of the pending and yet to be filed applications by long-haul trucking interests for air freight forwarder authorization. As such, these two sections -and, indeed, the whole tenor of the entire petition are directed to the alleged consequences of a hypothetical mass invasion of the air freight forwarder field by trucking interests. Petitioners had vigorously urged in the court below substantially the same argument respecting the procedural rules and regulations even prior to their effectiveness and that court held that it would be premature to review such orders inasmuch as

petitioners could not be hurt prior to the time that the Civil Aeronautics Board had actually granted authorizations pursuant to the regulations. The petition here now says that this would place upon petitioners the impossible burden of following each application and opposing it (A.20). Yet if petitioners are to escape that burden, there would have to be an order entered which would preclude the filing of such applications on the ground that no further entry should be permitted. This is precisely what the Board said it was unwilling to do (A.18-24).

In light of the Board's holding that there is no Congressional policy requiring exclusion of surface carriers from air freight forwarding, the Board obviously must make some provision for processing applications by long-haul trucking interests. Petitioners tacitly admit this but say that the regulations presage a policy of virtually free entry. This same argument (A.11-12) was answered by the court below by noting that it was unwilling to hold that the Board was insincere in its solemn statement that its policy would be one of monitored rather than free entry (A.18). The Supreme Court should be equally unwilling.

But the petition goes further. It urges that the holding of the Board that it will process both pending and future applications of long-haul trucking interests in accordance with the new regulations is an avoidance of the requirements of Section 8(b) of the Administrative Procedure Act. The section of that Act to which petitioners refer has been codified as Title 5 U.S. Code § 557(c). Apparently petitioners rest their argument upon the provision thereof requiring decisions by administrative agencies to state "(A) findings and con-

clusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof."

The cited section of the Administrative Procedure Act does not apply to rulemaking proceedings for which there is no requirement by statute that an adjudicatory hearing be held (Title 5 U.S.C. §§ 557(a), 556(a), and 553). Even were it otherwise, there would be no warrant for interposition of a court at this stage of the Board's effort to perform its statutory duty. As the court below pointed out (A.12), there has been entered no order of the Civil Aeronautics Board by which petitioners are required to do anything they have not previously done or to refrain from doing anything they were previously permitted to do, citing *Myers* v. *Bethlehem Shipbldg. Corp.*, 303 U.S. 41 (1938); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) and *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 704 (1967).

The petition ignores the very heart of the principle upon which the court below predicated its holding that insofar as the procedural regulations of the Board are concerned, the case is not ripe for review. With no effort to distinguish the cases relied on by the court below, the petitioner cites only *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942) in which the Court held that regulations looking toward the licensing of radio stations were reviewable upon the petition of a chain broadcasting company.

The *Columbia Broadcasting* case was interpreted by the Supreme Court itself in *U. S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), when at page 199 of its

opinion, the Court quoted as follows from its opinion in the earlier case:

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and busineess relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked."

The principle of the *Columbia Broadcasting* case was followed in the *Storer Broadcasting* case where it was held that regulations promulgated by the Federal Communications Commission to fix the maximum number of broadcasting stations in which any one person might own an interest raised an issue by which Storer was aggrieved inasmuch as it had already achieved that number and would be prevented by the regulation from acquiring additional interests in the future. Storer was, therefore, said the Court, clothed with status to bring into issue the lawfulness of the rules and regulations.

In the instant case the regulations of the Board do not in any way impinge upon the present operations or obligations of the petitioners. At most, they suggest that new competition will be injected into the field now occupied by petitioners. But until that new competition has been authorized by affirmative action of the Civil Aeronautics Board, petitioners are not aggrieved and cannot invoke the provisions of the Administrative Procedure Act respecting court review of agency action.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari lacks merit and should be denied.

Respectfully submitted,

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February 20, 1970

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1105

ABC AIR FREIGHT COMPANY, INC., ET AL.,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not yet reported. The prior opinion of the court of appeals (Pet. App. 91-116) is reported at 391 F. 2d 295. The Board's reports and orders (Pet. App. 15-67, 119-201) are not yet reported. The Board's Notice of Proposed Rule Making (Pet. App. 68-90) is published at 34 Fed. Reg. 6853.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1969. The petition for a writ of certiorari was filed on January 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board complied with the Federal Aviation Act in authorizing three long-haul motor carriers to engage in the air freight forwarding business on a limited and experimental basis.

2. Whether the court of appeals erred in determining that a Notice of Proposed Rule Making setting forth proposed rules governing the entry of other surface carriers into air freight forwarding was not, in view of all the circumstances, ripe for judicial review.

STATUTE INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958 (72 Stat. 737, as amended, 49 U.S.C. 1301 *et seq.*) are set forth in the Appendix to the petition (Pet. App. 202-205).

STATEMENT

Applications filed with the Civil Aeronautics Board by four long-haul motor carriers or their affiliates

sought authority to act as air freight forwarders.[1] An air freight forwarder is an "air carrier" who, within the meaning of Section 101(3) of the Federal Aviation Act, undertakes indirectly to engage in air transportation (49 U.S.C. 1301(3)). Ever since it first authorized air freight forwarding in the *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), the Board has licensed air freight forwarders by exemption in accord with the proviso of Section 101(3) of the Act.[2]

The Board assigned the matter for hearing to an examiner and instructed him to consider these four applications in the broader context of whether long-haul truckers in general should be allowed to act as air freight forwarders.[3] After a full hearing, the

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[1] The applicants were CF Air Freight, Inc.; D. C. International, Inc.; Navajo Freight Lines, Inc.; and P.I.E. Air Freight Forwarding, Inc. Navajo and D. C. are long-haul motor carriers; CF and P.I.E. are subsidiaries of long-haul motor carriers.

[2] Section 101(3) reads: "'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest."

[3] The Board had already authorized long-haul truckers of household goods to act as air freight forwarders for household goods. *Air Freight Forwarder Authority Case*, 40 C.A.B. 673 (1964). Short-haul truckers have been in this business since the very beginning. *Air Freight Forwarder Case*, 9 C.A.B. 473, 508 (1948). And the Board has on occasion permitted entry to applicants controlled by railroads. *Air Freight Forwarder Investigation*, 21 C.A.B. 536, 545-546 (1955).

examiner recommended that all four applicants receive air freight forwarding authority (Pet. App. 132). On review of the examiner's decision, the Board ordered that three of the four applicants receive the authority they had requested.[4] The Board stated that it was satisfied "that the applicants' entry will not lead to the ills which persuaded the Board to deny forwarder authority to some motor carriers in the past" (Pet. App. 122). While admitting that "predictions about the future always carry some measure of uncertainty," the Board concluded that the "applicants' entry into the field is likely to produce important public benefits" and "deserves a trial" (Pet. App. 122, 125).

Petitioners, several of the established air freight forwarders, sought review of the Board's order and decision in the Court of Appeals for the Second Circuit. Upon consideration the court vacated the Board's order and remanded the case (Pet. App. 114). In an opinion by Judge Friendly, the court said: "The most serious deficiency lies in the ambiguity whether the Board has established a policy of entry for all truckers who want to act as air freight forwarders or has merely granted the four [*sic*] applications that were before it, and the inadequacy of

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[4] Approval of the application of the fourth carrier, D. C. International, was deferred pending the filing of a proper application for approval of control by its new parent, National City Lines, Inc. The Board's order also approved the control relationships between the surface carriers and their subsidiaries in accord with Section 408 of the Federal Aviation Act (49 U.S.C. 1378).

its consideration of effect on the existing forwarders if the former is the right interpretation as we strongly suspect" (Pet. App. 97). The court also observed that a new policy of open entry to long-haul truckers was a marked departure from the Board's usual approach of careful and individualized examination of applications by surface carriers, in order to guard against any detrimental conflicts of interest (Pet. App. 102). It stated, however: "We would not wish to be misunderstood as ruling that even the present record might not be sufficient for the Board to initiate a properly controlled experiment in the authorization of truckers as air freight forwarders, with the limitation on numbers and the reporting and other requirements an experiment would be expected to entail" (Pet. App. 113-114).

On remand the Board resolved the ambiguity in its previous action which the court of appeals perceived. After careful analysis of the air freight forwarding market and reconsideration of the individual applicants and their plans (Pet. App. 25-40), it granted authority to those three applicants whom it had previously authorized.[5] The Board made it clear that "it is granting only the applications before it and not passing up on any others" (Pet. App. 17), and described its action as "a controlled experiment, limited to truckers who show a plan to promote air freight conscientiously" (Pet. App. 34). The purpose of the experi-

[5] The Board ruled on the existing record which it found to be "well documented and reasonably current" (Pet. App. 16).

ment, it noted, was to ascertain the existence, if any, of actual conflicts of interest in the engagement of motor carriers in the air freight forwarding business (Pet. App. 35). Since the grant of authority was experimental in nature, the Board ordered the imposition of several limiting conditions, including a five-year maximum term, subject to prior revocation for failure to perform air transportation adequately or conscientiously; a reservation of power to suspend the authority pending revocation hearings; and a requirement that special supplemental quarterly reports as well as a special annual report be filed with the Board (Pet. App. 54-56).[6] The Board indicated a willingness to receive similar applications from other long-haul motor carriers, and stated that the size and commodity rights of a trucker's business would not themselves be a bar to entry (Pet. App. 17). But it warned such prospective applicants: "For long-haul truckers who seek to become air forwarders, the rule will not be free entry, but monitored entry" (Pet. App. 18).

In a Notice of Proposed Rule Making (Pet. App. 70), issued simultaneously, the Board proposed the same stringent requirements for entry which it had imposed on the three motor carriers whom it had authorized to operate as air freight forwarders. It con-

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[6] The quarterly reports are: "Originating Air Station Data Schedule"; "Supplemental Operating Statistics Schedule"; and "Analysis of Traffic by Weight Breaks" (Pet. App. 55, 58-67). The annual report requires listing of air freight forwarding stations, air freight service areas at surface terminals, and personnel involved (Pet. App. 55).

templated granting authority to a long-haul trucker only on a showing of both the intent and the capacity to promote air cargo, and any applicants who received authority would be subject to the same limitations and monitoring already imposed on the three successful applicants.[7]

The established air freight forwarders again petitioned for review, contending principally that the Board had not complied with the court's previous mandate. The court of appeals ruled that its mandate had not been violated (Pet. App. 10) and, in an opinion written again by Judge Friendly, unanimously affirmed the Board's action (Pet. App. 1). The court recognized that the Board had embarked on a controlled experiment (Pet. App. 12), and rejected petitioners' contentions that the Board was too easily satisfied by the successful applicants. It commented as to the policy of monitored entry: "[A] reviewing court must assume the agency means what it says, unless and until experience should indicate the contrary" (Pet. App. 11). In addition, the court held that review of the proposed rules was premature until "the Board grants further authorizations to long-haul truckers under them" (Pet. App. 12).

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[7] The proposed rules were not adopted by the Board until November 12, 1969, subsequent to the decision of the court of appeals; they became effective January 5, 1970 (34 Fed. Reg. 19342-19343).

ARGUMENT

Although petitioners assert that the Board failed to carry out the mandate of the court of appeals, their principal contention is that the Board and the court below did not act consistently with the Federal Aviation Act (49 U.S.C. 1301 *et seq.*) in allowing truckers to engage in air freight forwarding. Congress has, however, vested the Board with broad powers and wide discretion to promote the development of a safe and efficient system of air transportation. See 49 U.S.C. 1302. In the controlled and limited experiment undertaken here the Board is properly and responsibly exercising that duty. The decision below correctly recognized this; there is no conflict among circuits; and no issue warranting plenary consideration by this Court is presented.

1. Petitioners claim that the Board's order allows "the nation's largest motor carriers as a class to become air freight forwarders" (Pet. 10). In so asserting they wholly fail to recognize that the Board did no more than permit three long-haul truckers to enter the air freight forwarding business on an experimental basis for specified period of time. Indeed, the Board emphasized "that it is granting only the applications before it and not passing upon any others" [8] (Pet. App. 17). It thus treated the three applicants, not as a "class", but as individuals, and

[8] Significantly, the Board denied motions to consolidate and intervene filed in the proceeding by seven other long-haul truckers (Pet. App. 48).

granted them authority only after careful examination of their particular plans for operations.

Moreover, the authorization given each of these three truckers was clearly experimental and tentative—the Board limited their authority to five years, set up revocation and suspension conditions, and put upon them special quarterly and annual reporting requirements to "enable the Board to monitor and maintain control over the experiment" (Pet. App. 41). In its opinion accompanying the order the Board did announce that the experiment would not be limited just to the three applicants who received approval, noting that "[i]f other trucking-related enterprises can show that they are equally dedicated to air cargo promotion, they too will be eligible to participate in the experiment under the terms of the proposed regulations issued today" (Pet. App. 36). However, the Board made certain that no trucker would doubt the seriousness of its assertion that "[f]or long-haul truckers who seek to become air forwarders, the rule will not be free entry, but monitored entry" (Pet. App. 18). Its proposed regulations put these prospective entrants to the same requirements for obtaining and holding temporary authority which the Board imposed on the three truckers who received grants of authority (Pet. App. 68). Thus, such applicants must show both the capacity and the desire to promote air cargo (Pet. 84-85),[9] and any grants of authority will be subject to

[9] A *pro forma* showing will be insufficient, for the Board "will not be satisfied with mere recitations; it will scrutinize

the same conditions governing revocation, suspension and reporting (Pet. App. 85, 88-90).

Since the Board explicitly limited its approval of the three applicants to the conditions of a controlled experiment, petitioners' claim (Pet. 13) that the Board has embarked on a wholesale reversal of established policy is not well founded. Moreover, petitioners misconceive the Board's past policy. The Board has not in the past excluded surface carriers from air freight forwarding, but on the contrary has admitted not only truckers but also affiliates of railroads in certain circumstances.[10] Its policy toward surface carriers or their affiliates has been one of discriminating caution. It has been sensitive to potential conflicts of interest, and has accordingly avoided the rigidity of either blanket invitation or blanket prohibition. Rather, since the Board first authorized air freight forwarders in 1948 it has proceeded on an individualized basis and approved or disapproved particular applicants after considering their operating plans in the context of the market they seek to enter. Thus, in the original *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), the Board's analysis led it to approve grants of authority to ten affiliates of truckers, three of which were motor common carriers (*id.* at 510).

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each application (and any objection) to insure that these criteria are met" (Pet. App. 18).

[10] *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948) (truckers admitted); *Air Freight Forwarder Investigation*, 21 C.A.B. 536 (1955) (railroad affiliates admitted); *Air Freight Forwarder Authority Case*, 40 C.A.B. 673 (1964) (long-haul motor carriers of household goods admitted).

At the same time, however, the Board referred to potential conflicts of interest in holding that grants requested by two affiliates of major railroads were not consistent with the public interest (*ibid.*).[11] Later cases have demonstrated the Board's careful process of inclusion and exclusion of surface carriers in air freight forwarding; in each instance, the decision relating to conflicts of interest was made after thoughtful examination.[12]

The Board's opinion in this case shows that it seriously weighed possible conflicts of interest before authorizing the three applicants to participate in this experiment (Pet. App. 31-35). After examining the plans of the three applicants and the market they sought to enter, the Board concluded: "Each applicant has given persuasive evidence of its intention to promote air cargo. Each has offered a different organizational plan to guard against conflicts with the related surface operation" (Pet. App. 35-36). The Board, moreover, was doubly cautious, for it granted the authority only as part of a controlled experiment to determine whether, and to what ex-

[11] The Board here cited and paraphrased the "public interest" language of Section 408 of the Federal Aviation Act (49 U.S.C. 1378) (see Pet. App. 204).

[12] Thus, in the second *Air Freight Forwarder Investigation*, 21 C.A.B. 536 (1955), the Board permitted the entry of two applicants controlled by large railroads. But examination of Railway Express Agency's particular structure, size and affiliations showed a conflict of interest that caused the Board to deny it a grant of authority to engage in air freight forwarding. *Railway Express Agency, Inc., Air Freight Forwarder Application*, 27 C.A.B. 500 (1958).

tent, motor carriers or their affiliates actually would experience conflicts (Pet. App. 35). The court of appeals correctly concluded that the Board had carefully appraised the plans of the three applicants, and that substantial evidence supported the Board's finding that they genuinely intended to promote air cargo service (Pet. App. 10).

Petitioners' contention that experimentation is impermissible in these circumstances (Pet. 22) is mistaken. Section 102 of the Federal Aviation Act (49 U.S.C. 1302) charges the Board with comprehensive responsibility for the development of an air transportation system which will serve the present and future needs of the nation, preserve the inherent advantages of air transportation, improve relationships with coordinate transportation and promote competition to the extent necessary to assure further development of the nation's air transportation system. Given the dynamic nature of the air transportation industry, power in the Board to experiment and innovate is essential to performance of these responsibilities. Cf. *American Trucking Ass'ns* v. *Atchison T.&S.F.R. Co.*, 387 U.S. 397, 416. And, "in the absence of compelling evidence that such was Congress' intention, [courts have been] unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *Permian Basin Area Rate Cases*, 390 U.S. 747, 780. Cf. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177.

Congress has not foreclosed this kind of administrative flexibility insofar as entry by surface car-

riers into air freight forwarding is concerned. The second proviso of Section 408(b) of the Federal Aviation Act, on which petitioners rely, is literally inapplicable to indirect air carriers such as air freight forwarders because they do not directly use aircraft in their operations (Pet. App. 7, 104). Assuming that the statute nonetheless radiates a policy applicable to indirect carriers (Pet. App. 104), it does not operate as the total bar seen by petitioners, but simply as an implied direction to the Board to concern itself with possible conflicts of interest between air and surface operations which might affect indirect air carriage. As the court below held, the Board's decision on remand was specifically addressed to this concern; it adopted a policy of closely scrutinized, selected entry under tight controls and specifically tailored restrictions (Pet. App. 10). Against this background the record provides ample support for the authorizations in this case.[13] And, since the Board's opinion sets forth a rational basis for the policy adopted, the court of appeals properly rejected

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[13] Further support for the Board's action may be found in the recent amendment to Section 408(a)(5), contained in P.L. 91-62 (83 Stat. 103). This statute requires approval of any acquisition of an air carrier by any person, but authorizes the Board to exempt acquisitions of non-certificated air carriers from this requirement. Since air freight forwarders are among the "noncertificated" carriers whose acquisition may be exempted (H. Rep. No. 426, 91st Cong., 1st Sess., p. 3), it is clear that no class of persons, not even affiliates of surface carriers, are automatically disqualified from entering the air freight forwarding business by acquisition. *A fortiori*, the Board may authorize *de novo* entry by such affiliates. See Pet. App. 7, n. 2.

as an invasion of the Board's policy-making responsibilities petitioners' contention that the Board was too easily satisfied (Pet. App. 10).[14]

2. Similarly, there is no merit in petitioners' argument (Pet. App. 18-21) that the court of appeals erred in refusing to review the Board's proposed rules. The Board had not at the time of decision below formally adopted the proposed rules (see note 7, *supra*), and any judicial review at that time would have been wholly premature. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. Moreover, as this Court held in *Toilet Goods Assn.* v. *Gardner*, 387 U.S. 158, a challenge to administrative action is not ripe for judicial review until "the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs" (*id.* at 164). Neither the proposal of

[14] Petitioners' suggestion (Pet. 16) of a direct conflict between the Board's decision and the court of appeals over the meaning of Section 408(b) does not provide a basis for review here, for as the court of appeals noted (Pet. App. 10): "the nuance of difference between the Board's views and those intimated in our previous opinion did not affect its decision." The Board's statement on remand that the second proviso of Section 408(b) does not "reflect a Congressional policy against surface carrier participation in the air forwarder business" (Pet. App. 18) was addressed to the petitioners' contention that the statute implies a total bar. The court of appeals never adopted this view, as its first opinion makes clear. Had it done so there would have been no basis for a remand or for the court's statement that it "would not wish to be misunderstood as ruling that even the present record might not be sufficient for the Board to initiate a properly controlled experiment in the authorization of truckers as air freight forwarders" (Pet. App. 113-114).

the rules, nor indeed even their adoption, in view of their nature and effect, results in the kind of impact on petitioners which is required to obtain judicial review. The rules, however, clearly provide for objections to any applicant by interested persons (Pet. App. 79), and any actual grants of authority under those rules will supply the allegedly aggrieved petitioners the ripeness their challenge now lacks.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1105

ABC AIR FREIGHT COMPANY, INC.; ADD AIRFREIGHT CORPORATION; AIRBORNE FREIGHT CORPORATION; AIR-LAND FREIGHT CONSOLIDATORS, INC.; AIR-SEA FORWARDERS, INC.; AIRWAYS AIRFREIGHT; BARNETT AIR CARGO, INC.; PETER A. BERNACKI, INC.; HENNEL, BRUCKMANN & LORBACHER, INC.; INTERNATIONAL CUSTOMS SERVICE, INC.; H. G. OLLENDORFF, INC.; PANALPINA AIRFREIGHT INC.; WTC AIR FREIGHT, and AIR FREIGHT FORWARDERS ASSOCIATION, *Petitioners*

against

CIVIL AERONAUTICS BOARD

and

CF AIR FREIGHT, INC.; CONSOLIDATED FREIGHTWAYS, INC.; P.I.E. AIR FREIGHT FORWARDING, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; NAVAJO FREIGHT LINES, INC.; YELLOW FREIGHT SYSTEM, INC.; GLOBAL AIR CARGO LTD.; GATEWAY TRANSPORTATION CO., INC.; and GATEWAY AVIATION, INC., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENTS CF AIR FREIGHT, INC., CONSOLIDATED FREIGHTWAYS, INC., P.I.E. AIR FREIGHT FORWARDING, INC., AND PACIFIC INTERMOUNTAIN EXPRESS CO.

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ABC AIR FREIGHT COMPANY, INC.; ADD AIRFREIGHT CORPORATION; AIRBORNE FREIGHT CORPORATION; AIR-LAND FREIGHT CONSOLIDATORS, INC.; AIR-SEA FORWARDERS, INC.; AIRWAYS AIRFREIGHT; BARNETT AIR CARGO, INC.; PETER A. BERNACKI, INC.; HENSEL, BRUCKMANN & LORBACHER, INC.; INTERNATIONAL CUSTOMS SERVICE, INC.; H. G. OLLENDORFF, INC.; PANALPINA AIRFREIGHT INC.; WTC AIR FREIGHT, and AIR FREIGHT FORWARDERS ASSOCIATION, *Petitioners*

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CF AIR FREIGHT, INC.; CONSOLIDATED FREIGHTWAYS, INC.; P.I.E. AIR FREIGHT FORWARDING, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; NAVAJO FREIGHT LINES, INC.; YELLOW FREIGHT SYSTEM, INC.; GLOBAL AIR CARGO LTD.; GATEWAY TRANSPORTATION CO., INC.; and GATEWAY AVIATION, INC., *Respondents*

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BRIEF IN OPPOSITION FOR THE RESPONDENTS CF AIR FREIGHT, INC., CONSOLIDATED FREIGHTWAYS, INC., P.I.E. AIR FREIGHT FORWARDING, INC., AND PACIFIC INTERMOUNTAIN EXPRESS CO.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix of Petition, 1-14) is not yet reported. The earlier opinion of the Court of Appeals (App. 91-116) is reported at 391 F. 2d 295. The findings and orders of the Civil Aeronautics Board (App. 15-90 and 117-201) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1969. The petition for a writ of certiorari was filed on January 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented are set forth in the Petition, as follows:

"1. Whether the Court's decision allowing the Board to authorize long-haul motor carriers as air freight forwarders violated Congressional policy as evidenced in the Federal Aviation Act of 1958 and elsewhere.

"2. Whether the Court below deprived Petitioners of their rights to judicial review of the Board's Order and Regulations, contrary to 49 U.S.C. § 1486.

"3. Whether the Court's decision violated the Administrative Procedure Act, 5 U.S.C. § 557(c), by allowing the Board to substitute a so-called "experiment" for the findings, conclusions and reasons required by the Act, or otherwise."

STATUTES INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958, as amended (the "Act"), the Administrative Procedure Act, and the regulations of the Civil Aeronautics Board are set forth in the Appendix to the Petition for Certiorari, at pages 202-212.

In addition, 49 U.S.C. 1371 (d) (1) (§ 401 (d) (1) of the Act) provides:

> (d) (1) The Board shall issue a certificate authorizing the whole or any part of the transporta-

tion covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

STATEMENT

Administrative proceedings were instituted by the Civil Aeronautics Board (the "Board") on January 12, 1966, by Order E-23117, consolidating for hearing the pending applications filed by four long-haul motor carriers for air forwarding licenses.[1] Although the Board from time to time had previously authorized numerous motor carriers and other surface carriers, or affiliates thereof, to engage in air transportation as air freight forwarders, the Board had never had occasion to consider applications for such authority from long-haul truckers. The Board, therefore, included in the proceeding a comprehensive investigation "to fully explore the possible consequences of allowing motor carriers, such as applicants, to be air freight forwarders * * * ". The Board also later stated, in its first opinion in the proceeding, that "Our purpose in instituting this investigation was to determine whether our traditional restrictions on surface car-

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[1] The Board's order of investigation did not define long-haul carriers. However, proposed regulations issued by the Board at the conclusion of the proceeding define the term "long-haul motor carrier" to mean "a motor carrier holding operating rights issued by the Interstate Commerce Commission to haul general commodities between any pair of points which are over 500 air miles apart, or an affiliate of such a carrier." (App. 73).

riers have become outmoded for motor carriers like the applicants."[2] (App. 122).

Although the Board's first opinion and order in the proceeding granted only four new air forwarder licenses, the opinion also contained findings, stemming from the investigative phase of the proceeding, concerning the entry of motor carriers generally into the field of air freight forwarding. On review, therefore, the Court of Appeals remanded the proceeding to the Board, finding that the "most serious deficiency" in the first decision of the Board was its ambiguity as to "whether the Board has established a policy of entry for all truckers who want to act as air freight forwarders or has merely granted the four applications that were before it, and the inadequacy of its consideration of effect on the existing forwarders if the former is the right interpretation as we strongly suspect." 391 F. 2d 295, 298 (App. 97).

On remand the Board, after reargument and reconsideration, issued its opinion and order granting air freight forwarder authorizations to three applicants,[3] and making it clear that its action was so limited. The Board's opinion is explicit on this point:

> "Reviewing the record in the light of the Court's opinion, the Board believes that it can and should

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[2] In the case of applicants other than surface carriers or aviation enterprises, or their affiliates, the Board has always followed a policy of "free entry" into air freight forwarding. Such other applicants are not required to show public need for additional service, but are granted operating authority if they can meet minimum insurance and similar requirements. *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), 500-501.

[3] The application of D.C. International, Inc., the fourth application embraced in the first decision, was dismissed by the Board in its Order on the ground that intervening events had made the application moot. (App. 42-43).

> grant authority to the three applicants who received awards before (footnote omitted). In brief, the Board finds that those applicants' authorizations will result in substantial public benefits, will not result in conflicts of interest which will interfere with the promotion of air cargo, and will not reduce effective competition by the existing air forwarding industry." (App. 17).

Again, in order to underscore its holding, the Board said:

> "The Board emphasizes, however, that it is granting only the applications before it and not passing upon any others." (App. 17).

With respect to the issues involved in the investigative phase of the proceeding the Board stated as follows:

> "For other applicants, the Board tentatively concludes only that it should not deem the size, geographical extent, or general commodity rights of a trucker's surface operations or authority—of themselves—as factors showing that the trucker should be barred from the air freight forwarding business. But long-haul truckers of general commodities will not be granted air forwarding licenses routinely. Instead, each trucker applicant will be required to show that it will conscientiously promote air cargo and that its operations, either alone or in combination with others already licensed, will be in the public interest. The Board will not be satisfied with mere recitations; it will scrutinize each application (and any objection) to insure that these criteria are met. And the Board will maintain a close watch over the experiment through new and more detailed reporting requirements. As a final safeguard, the Board will reserve the power to suspend the processing of new applications and, if necessary, even to terminate outstanding licenses.

> This policy is being codified in proposed regulations issued concurrently with this order. For long-haul truckers who seek to become air forwarders, the rule will not be free entry, but monitored entry." (App. 17-18).

Thus it is clear that the Board took two separate but related actions. *First,* acting on the applications consolidated in the proceeding, the Board by order granted three applications for forwarder authority. *Second,* taking cognizance of the investigative phase of the proceeding, it tentatively concluded that there should be no absolute bar *against* long-haul truckers, and issued a Notice of Proposed Rule-Making setting forth proposed standards and procedures for the future grant or denial of applications from such truckers. As a result, additional applications can and will be considered by the Board.

As to the three applications it granted, the Board concluded that the applicants had made a strong and particularized showing that their entry into the air freight forwarding business "is likely to produce important public benefits" (App. 24). The Board, reviewing the relevant data, concluded that (1) the air freight industry was lagging seriously and that there was "a demonstrated need for new, able, and well-financed enterprises to enter the air forwarding business" (App. 25-27); that (2) experience had shown that "for many years, few large independents have asked to become forwarders, so that "[i]f the Board spurns the trucking-related applicants now, it will be left with nothing better than the bare hope that other applicants, equally qualified but without long-haul surface connections, will emerge someday" (App. 27); and that (3) the three applicants, in view of their

financial, managerial, and operational resources, "will be a potent force in developing new air freight" both in existing markets and also in the smaller, "less productive cities" where the applicants intend to establish operations (App. 28-29).

The Board also considered in detail the question of impact of the three new authorizations upon the air forwarder industry. It concluded that, in view of the demonstrated growth and ever-increasing potential of the air freight market, entry of these three applicants would not undermine the overwhelming majority of forwarders but rather "will stimulate so much new freight that they will contribute to the existing forwarders' continued growth" (App. 36-39); that as to those "small companies [which] have begun forwarding businesses which are ill-conceived, inadequately financed, and poorly managed . . . it makes no difference whether competition comes from the applicants or from the many large independent forwarders" (App. 39-40); that, in short, the "case for protection is far more speculative than the case for competition" and that "competition is also the preferred statutory goal" (App. 40); and that there is "no reason to believe that air forwarding will be inundated by long-haul truckers and railroads" both because of the fact that so few have applied and because the Board's monitored-entry policy will be selective as to those truckers who can qualify to become forwarders" (App. 40). Finally, on the question of conflicts of interest with their surface operations, the Board found that on the evidence of record the applicants had demonstrated that the conflict of interest theory should not be a bar because, in a variety of ways stated in detail in the opinion, they would establish separate air freight

operations devoted exclusively to that service, because air freight is in large part small-package freight and such freight is not very attractive to motor carriers, because the experience of those surface carriers now in air forwarding "teach[es] some skepticism" about "whether the conflict of interest hypothesis has any remaining vigor for truckers . . . like the three applicants," and because in any event the Board will closely supervise this "controlled experiment." The Board concluded:

> "The time has come, the Board believes, to test the conflicts hypothesis in a controlled experiment. Each applicant has given persuasive evidence of its intention to promote air cargo. Each has offered a different organizational plan to guard against conflicts in the related surface operation. Only experience can verify or disprove the applicants' promise, or indicate whether one's organizational format is sounder than another's. During the experimental period, the Board will receive from the applicants special reports showing whether the applicants are stimulating new off-line business, increasing traffic from outside present terminal areas, and receiving new traffic from their surface divisions or affiliates. That information will enable the Board to answer the conflicts question on the basis of fact, not surmise." (App. 35-36).

On review of the Board's second opinion and order, the Court below dismissed the petition for review insofar as it related to the Notice for Rule-Making. The Court held that review was premature, since the proposed regulations had not yet been adopted, but that even if they had been, Petitioners will be affected by the regulations, and therefore have standing to chal-

lenge them, "only when, as and if the Board grants further authorizations to long-haul truckers under them." (App. 12).

The petition to review the three new air forwarder authorizations was denied. The Court recognized that the Board was granting only the three applications before it, thus resolving the ambiguity found in the Board's first opinion. On the question of the policy concerning surface carrier participation in air freight forwarding, the Court held that "the Board did not deny that it must consider the bearing of prospective air freight forwarders' involvement in surface transportation, it said only that this should not constitute a bar." (App. 10). The Court, noting that the Board had satisfied itself that a proper showing had been made on this issue by the applicants, accepted the Board determination of this issue. (App. 10).

REASONS FOR DENYING THE WRIT

Petitioners do not claim, nor could they, that the decision below conflicts with that of any other court. Indeed, they do not even identify any statutory provision that they urge has been misconstrued. In the end, their petition amounts simply to a plea that this Court review the Board's judgment as to issues of transportation policy. Such a plea has no place in any court, much less is it a basis for invocation of this Court's power of discretionary review.

1. Petitioners concede that the Board was not precluded by any statute from issuing freight forwarder certificates to applicants. Licenses to engage in air transportation as air freight forwarders are issued by the Board under familiar standards of public interest

as defined in section 102 of the Act.[4] It is true, as Petitioners point out, that in cases of acquisitions by common carriers of air carriers, section 408 imposes requirements more stringent than the general public interest and public convenience and necessity standards of section 102;[5] and that the Board has, as a matter of policy, applied those more stringent requirements even where surface carriers were applying for air carrier certificates rather than simply seeking authority to acquire such a carrier. *American President Lines, et al., Petition,* 7 C.A.B. 799 (1947); *National Air Freight Forwarding Corp.* v. *CAB,* 197 F. 2d 384 (D.C. Circ. 1952). Because of the limitations of the second proviso of section 408(b), the consequence has been that as a practical matter surface carriers have been unable to enter the field of air transportation *as direct air carriers operating aircraft.*

At the same time, as petitioners acknowledge (Pet. p. 14), the Board has consistently and repeatedly held that the second proviso of section 408(b) is *not* applicable to applications under section 408 to acquire air

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[4] Air freight forwarders do not themselves operate aircraft in air transportation, but utilize the aircraft operated by other, "direct" air carriers. Air freight forwarders in the terminology of the Act are "indirect" air carriers, and have in fact been licensed exclusively under the exemption provisions of section 101(3) of the Act. "Direct" air carriers, on the other hand, have in most cases been licensed under section 401(d)(1) of the Act.

[5] A proposed acquisition must meet the requirement of "public interest" as defined in section 102 and the anti-monopoly test of the "first proviso" of section 408(b). The most stringent requirement, however, is that of the "second proviso" of section 408(b), which requires a surface carrier applicant under section 408 to show that "the transaction proposed will promote the public interest by enabling * * * [the surface carrier applicant] to use aircraft to public advantage in its operation and will not restrain competition."

freight forwarders, nor is that proviso applicable to applications by surface carriers for licenses to engage in air freight forwarding. *Air Freight Forwarders Case,* 9 C.A.B. 473 (1948), at 502-503. That position was affirmed over 20 years ago by the Court of Appeals for the Seventh Circuit, *American Airlines* v. *C.A.B.,* 178 F. 2d 903, 909 (7th Cir. 1949); was reaffirmed by the court below in the case at bar (App. 7); has never been questioned by any other court in the intervening years; and is not questioned by Petitioners in this case.

2. What Petitioners contend is, not that the Board or the lower court has misconstrued the statute, but that the Board with the approval of the Court has changed its policy. As Petitioners put it, the Board has "for over twenty years . . . applied a *rigid policy of exclusion* against surface carrier invasion of *air freight forwarding*" (Pet. 14). Even were that so, it would not matter. To make and to change policy with the march of events is what the Board is there for, so long as it honors the statute and abides by governing procedural requirements. As this Court aptly said in *American Trucking Ass'ns.* v. *Atchison, Topeka & S. Fe RR,* 387 U.S. 397, 416 (1967):

> "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."

Beyond that, Petitioner's view of past Board policy is, to put it conservatively, greatly overdrawn. In

point of fact, under the Board's standards—although stricter than those applied to ordinary applicants—surface carriers, and particularly motor carriers, have participated in air freight forwarding to a substantial extent.[6] In 1948 in *Air Freight Forwarder Case, supra,* nine surface forwarders, surface forwarder affiliates, and motor carrier affiliates were licensed. A year later, in the international phase of the proceeding, additional surface forwarder and railroad affiliates were licensed. *Air Freight Forwarder Case (International),* 11 C.A.B. 182 (1949). In 1953, acting on an individual application, the Board authorized United Parcel Service, which owned 12 regional general commodity motor carriers operating in a number of states, to acquire an air forwarder. Order E-7324, April 22, 1953. In *Airfreight Forwarder Investigation,* 21 C.A.B. 536 (1955), two railroad affiliates were licensed for domestic air forwarding. In *Airfreight Forwarder Authority Case,* 40 C.A.B. 673 (1964), eight long-haul motor carriers of household goods (or affiliate) were authorized to engage in air forwarding of household goods. The latter case contains a succinct and precise statement of the standard policy applied by the Board in air forwarder cases, as follows:

> "The Board has prohibited entry by surface carriers into the air freight forwarder field where it appeared that such conflicts of interest would arise between air and surface operations as to

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[6] Indeed, in more than twenty years since the first *Forwarder Case* in 1948 the Board has denied only *one* application by a trucker, or affiliate, for an air forwarder license. *Telstar Air Freight, Inc.,* Order E-22479, issued under delegated authority July 27, 1965. The order makes it clear that the staff considered that the applicant failed to meet the conflicts standard applied to surface carriers and quoted in this brief, *infra,* p. 12-13.

result in material diversion of traffic from air to surface transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding." (40 C.A.B. at 765).

In sum, the Board's policy concerning surface carrier participation in air freight forwarding (1) has not been the rigid policy of exclusion which has virtually foreclosed surface carrier participation in direct air transportation, but (2) under the doctrine quoted above from 40 C.A.B. at 765, has required an evaluation of "conflicts of interest" and promotion of air forwarding in the light of the facts of each case. Contrary to Petitioners' contentions, therefore, the Board did not act in a manner contrary to Congressional intent[7] and long-standing administrative construction. Rather, what the Board did was simply to conclude, on the basis of ample evidence and thorough reflection, that application of these principles should not automatically bar long-haul motor carriers from the air freight forwarding field, but that rather, on an experimental basis, each application from such a carrier should be judged on its own facts. As the Court below correctly found, that was a reasonable exercise of the Board's licensing powers under the Act.

3. Petitioners also contend that they were deprived of a right to review of the Board's regulations respecting future air forwarder applications by long-haul motor carriers. The contention is frivolous.

[7] Indeed, Congress has been requested by the air freight forwarders, but has declined to abolish the free entry system for air forwarding. See H.R. 4859, 90th Cong., 1st Sess. (1967); H.R. 4181, 88th Cong., 1st Sess. (1963); Hearings before Subcommittee on Small Business, 89th Cong., 1st Sess. 103-121, 129 (Vol. 1, 1966).

When review was sought, the regulations had not been made effective. Rather, they had been circulated and comments from interested parties had been invited. As the court below said, "Although comments on the proposed regulations were due by May 23, 1969, the Board has not yet acted upon them, and review would thus be premature" (App. 12).[8]

4. Finally, Petitioners contend that the Board did not make adequate findings under Section 8(b) of the Administrative Procedure Act, 5 U.S.C. 557(c). In view of the comprehensive opinion of the Board, this contention is not easy to understand. Evidently the notion is that the Board resorted to "experimentation" in lieu of proper findings. But neither the Board nor the lower court so much as hinted that the Board's "experimental" approach to the problem at hand obviated the need for adequate findings respecting the applications that were granted, and in fact the findings were detailed and exhaustive. Furthermore, the court below has twice reviewed the findings of the Board,

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[8] The regulations were adopted on November 12, 1969, and became effective January 5, 1970. 34 Federal Register 19340-6. It is interesting to note that review was not sought within the statutory period of sixty days after November 12, 1969. Section 1006(a) of the Act, 49 U.S.C. 1486(a). Had review been sought, for reasons outlined by the court below, it would have been unavailing, for these regulations are not the sort of regulations that are the appropriate subject of judicial review. As the Court below pointed out, the regulations "do not compel petitioners to do anything they have not previously done or to refrain from doing anything they were previously permitted to do * * *." (App. 12). They are not faced with the dilemma of incurring injury through compliance, or, on the other hand, risking penalties for non-compliance. Petitioners complain only of possible future competition—issues which can more appropriately be resolved after the general criteria in the regulations have been applied by the Board to further applications for air forwarder licenses.

and Petitioners have failed to show why the lower court's determination respecting the adequacy of the findings should be considered further by this Court.

Petitioners also set forth certain "examples" of findings of the Board and the evidence or lack of evidence supporting them, "merely to shed light on the Board's action, which the Court sanctioned, whereby it * * * substituted 'experimentation' for findings, reasons and evidence required by section 8(b) of the Administrative Procedure Act."[9] Petitioners selected samples related to the evaluation of evidence, and were or should have been presented to the Court below. Moreover, the contentions in the Petition for Certiorari do not correctly, fully or fairly explain the nature of the Board's findings, or the evidence supporting them. No useful purpose would be served by discussing these contentions in detail, but we comment on them briefly in the margin.[10]

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[9] The "examples" are also said to "shed light" on the Board's refusal to apply the Congressional policy and on its resort to "artful devices to avoid review of the issue of competitive impact". We submit that the examples are irrelevant to both issues and shed no light on either of them.

[10] The comments as numbered below correspond to the numbered paragraphs of the Petition at pages 24 through 26:

1. Petitioners grossly misstate the Board's findings concerning overabundance of capacity. The Board considered both all-cargo and passenger aircraft capacity, and found that "even without considering the additional freight capacity of combination aircraft [i.e., aircraft fitted out to carry passengers and freight], air cargo must expand several times to fill the airlines' pressing need for more freight." (App. 25). The precise and detailed findings demanded by Petitioners are unnecessary in light of the tremendous growth in capacity.

2. Petitioners misstate the Board's findings on secondary markets. The Board found only that the three successful applicants have an exceptional ability to stimulate air freight in under-

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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developed cities, and are the most likely candidates to provide needed competition there, because of their financial strength and their ability to utilize their surface facilities at such points. (App. 28-29). Moreover, Order E-25513 cited by Petitioners is not pertinent: the Board was deciding only which domestic points should be consolidated for hearing in a U.S.-Europe air freight investigation.

3. Contrary to Petitioners' contentions, the Board made extensive findings on the issue of conflicts of interest, and reached conclusions which supported the authorization of experimental service. (App. 31-36).

4. Petitioners' point 4 is an astonishing blend of misstated findings and tortured reasoning. A reading of the Board's opinion reveals that none of the findings of fact and reasoning is correctly stated, except the statement that most existing forwarders concentrate services at major points. (App. 24-36).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 1970, copies of the Brief in Opposition for Respondents CF Air Freight, Inc., Consolidated Freightways, Inc., P.I.E. Air Freight Forwarding, Inc., and Pacific Intermountain Express Co., were mailed, postage prepaid, to the following:

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